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ADMINISTRATIVE RULEMAKING REFORM ACT OF 1976

APRIL 6, 1976.—Ordered to be printed

Mr. FLOWERS, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 12048, which on FEBRUARY 24, 1976, was referred jointly to the Committee on the Judiciary and the Committee on Rules]

The Committee on the Judiciary, to whom was referred the bill (H.R. 12048) amending title 5 of the United States Code to improve agency rulemaking by expanding the opportunities for public participation, by creating procedures for congressional review of agency rules, and by expanding judicial review, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 9, line 17: Strike "withdrawn," and insert "withdrawn or".

Page 9, lines 18 and 19: Strike "or disapproved by resolution of Congress,".

PURPOSE

The purpose of the proposed legislation, as amended, is to provide for congressional review of regulations issued by federal departments and agencies. The bill would provide for disapproval of proposed regulations by concurrent resolution of the Congress, and for a direction by a resolution of either House of Congress requiring departments and agencies to reconsider proposed or existing regulations. In order to relate these procedures to the rulemaking procedures of the Administrative Procedure Act, conforming and related amendments are made to sections governing administrative procedure and judicial review in title 5 of the United States Code.

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Finally it is provided that the emergency rule is to expire in 210 days or upon the effective date of a final rule.

Subsection (*g*) provides that when rules by statute are required to be made on the record after hearing, sections 556 and 557 are to apply to significant issues of fact in dispute, instead of subsections (b), (c) and (d) of revised section 553. Present subsection (c) has similar language but does not have the reference to "significant issues of fact in dispute."

Subsection (*h*) is essentially a restatement of present subsection (g) on the right to petition for a rule's issuance, amendment or repeal.

OUTLINE OF PROVISIONS OF THE BILL

SECTION 1

The popular name of the Act is to be the "Administrative Rulemaking Reform Act of 1976".

SECTION 2

Subsection (a) Amends section 551 of title 5 to revise the definition of "rule" as basically "an agency statement of general applicability". Also as required by new chapter 6 on congressional review, "emergency

Subsection (i) provides language somewhat similar to that found in the Federal Register Act (44 USC 1507) and the Freedom of Information Act (5 USC 552) as to the effect of a rule which fails to comply with the section.

SECTION 4

Section 4 of the bill adds a new chapter 6 to title 5 of the United States Code concerning congressional review of agency rule making.

New section 601 defines terms applicable to the chapter and with limited exceptions incorporates the definitions of sections 551 of chapter 5 on administrative procedure. The terms "rule" and "emergency rule" are subject to certain limited exceptions which are also found in the rulemaking provisions of section 553. The term "promulgation" means filing with the Office of Federal Register for publication.

Section 602 provides for resolutions of disapproval. Upon promulgation, a copy of a rule is to be transmitted to the Secretary of the Senate and the Clerk of the House. A promulgated rule (other than an emergency rule) will not go into effect if both Houses of Congress adopt a concurrent resolution disapproving the rule. A rule will aso be disapproved if one House adopts the concurrent resolution within 60 days and the other House fails to take adverse action on the resolution.

If no committee of either House has reported such a concurrent resolution or has been discharged within 60 calendar days or neither House has passed it, the rule may go into effect. If any of those events occur and the resolution is not disapproved, it can go into effect not sooner than 90 days after promulgation.

In the absence of a statute modifying the agency's powers, the agency may not promulgate a new rule or an emergency rule identical to one disapproved under the section. After such disapproval, the procedures for rule on that subject proposed within less than 12 months may be limited to changes in the rule.

Section 603(a) provides that either House can pass a resolution directing an agency to reconsider an existing rule (other than an emergency rule) or a proposed rule. If such a resolution is adopted by either House within 90 calendar days of continuous session after promulgation, a new rule will not go into effect and the agency must then reconsider the rule and within 60 days either withdraw or repromulgate the rule or it will lapse. A repromulgated rule is subject to the congressional review provisions of Chapter 6.

If, within 60 days of promulgation, a committee of either House has not reported a resolution for reconsideration or has not been discharged within 60 days after promulgation, the rule goes into effect. If a committee has reported or has been discharged and the resolution doesn't pass the House concerned, the rule may go into effect in 90 days.

Subsection 603(c) of section 603 concerns resolutions for reconsideration of rules which have gone into effect. If, after 180 days of passage of such a resolution the rule has not been repromulgated, the rule shall lapse. Prior to 60 days before repromulgation the agency must give notice of the repromulgation proceedings, and the notice and proceeding must comply with section 553 (b) and (c) as to procedures for rulemaking. (The exceptions in 552(b)(3) will not be applicable.) Rules repromulgated within 180 days of passage of the reconsideration

resolution take effect as provided in section 602(a), and during the period fixed for congressional review, the reconsidered rule may remain in effect.

Subsection (d) makes it clear that a concurrent resolution of disapproval supersedes a resolution for reconsideration of the same rule or a part thereof.

Section 604 provides that where a law places a time limit for rule making and a concurrent resolution of disapproval passes the Congress, the agency must adopt the rule and the time limit in the specific statute is to apply to the renewed rulemaking from the date of final approval of either type of resolution.

Section 605 provides for the computation of "calendar days of continuous session of Congress" as that term is used in chapter 6. The period is interrupted only by a sine die adjournment, but days in which either House is not in session because of an adjournment of more than 3 days to a day certain are to be excluded from the computation.

Section 606(a) provides for the congressional procedure for the consideration of resolutions of disapproval and for reconsideration and states that the provisions of the section are enacted as an exercise of the rule making power of the Senate and the House of Representatives and are to be deemed a part of the rules of each House while recognizing the Constitutional right of either House to change its rules. The provisions of the section are to be applicable only with respect to the procedure to be followed by each House in the case of resolutions described in section 602 [disapproval of proposed rules] and section 603 [reconsideration of rules].

Subsection (b)(1) requires that resolutions of disapproval and resolutions for reconsideration of a rule are to be immediately referred to the standing committee having oversight and legislative responsibility over agency.

In subsection (b)(2) of section 606 it is provided that a committee may be discharged of a concurrent resolution of disapproval or a resolution for reconsideration. As to concurrent resolutions of disapproval of a proposed rule under section 602(a) or a resolution for reconsideration of a proposed rule under 602(b), a committee can be discharged of consideration after 45 "calendar days of continuous session" from referral of either type of resolution. A committee can be discharged from consideration of a resolution for reconsideration of an effective rule under section 603(c) when 90 such days elapse from date of referral.

When a concurrent resolution has been adopted by one House of Congress, it is provided in § 606(b)(3) that the committee to which it is referred in the other House which fails to report in 15 days may be discharged of its consideration.

Subsection (b)(4) of section 606 provides that a motion to discharge must be supported by one-fifth of the Members of the House of Congress involved, and is highly privileged in the House and privileged in the Senate (except that it may not be made after the committee has reported a resolution of disapproval or for reconsideration with respect to the same rule); and debate thereon shall be limited to no more than 1 hour, the time to be divided in the House equally between those favoring and those opposing the motion to dis-

charge and to be divided in the Senate equally between, and controlled by, the majority leader and the minority leader or their designees. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

Subsection (c) of section 606. The consideration of a resolution of disapproval or for reconsideration is to be in accord with the rules of the Senate and of the House of Representatives, respectively. Except that subsection 606(c) provides that when a committee has reported or has been discharged from further consideration of a resolution with respect to a rule, it would be in order to move to consider the resolution, and the subsection defines the procedure.

Section 607 concerns the effect on judicial review of congressional review procedures, and provides that congressional inaction on or rejection of a resolution of disapproval or for reconsideration is not to be deemed an expression of approval of the rule.

Sectin 608 provides for Administrative Conference study of the new congressional review process. A report would be made to Congress on or before July 1, 1982, and the sum of $200,000 would be authorized to be appropriated for the study.

SECTION 4(b) OF THE BILL

Subsection (b) adds the reference to new chapter 6, Congressional Review of Agency Rule Making, to the table of chapters in part 1 of Title 5, United States Code.

SECTION 4(c) OF THE BILL

Subsection (c) of the bill provides that the provisions of chapter 6 of Title 5, United States Code, would supersede any other provisions of law governing procedures for congressional review of agency rules to the extent such other provisions are inconsistent with such chapter for the period of three congresses fixed in Section 6 of the bill.

SECTION 5

This section makes amendments of section 706 on scope of review of Title 5 to conform that section to changes made by the bill to Section 553 of that title. It adds a reference in § 553(c)(3) concerning procedures where there is a "significant controversy over a factual issue" as to a proposed rule. Section 706 is also amended by the addition of a new clause (G) to section 706 providing as an additional basis for holding unlawful and setting aside agency action, findings and conclusions, a determination that such action is unwarranted by material in the rulemaking file.

SECTION 6

This section makes the Act effective at the beginning of the 95th Congress. It also provides that section 4 (adding Chapter 6 to Title 5) will lapse at the end of the 97th Congress unless renewed prior to the sine die adjournment of that Congress.

CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

The provisions for congressional review of agency regulations provided for by the bill in new chapter 6 added to Title 5 of the United States Code will provide the Congress with an effective means for supervision of rulemaking activity. Of course, the initial authority for such rulemaking activity stems from basic law enacted by Congress, and is encompassed in the general oversight responsibilities of the Congress. The Congress has a vital interest in rulemaking for regulations are a means to elaborate upon the content, meaning or application of a statute. The courts have upheld the validity of regulations based upon broad delegations of legislative authority. Clearly, the complexities of our modern society require that government have the flexibility to meet varied demands and problems, but this very reality requires that Congress have a practical means to disapprove regulations or require their reconsideration in certain instances in a deliberate and reasonable manner. The review of regulations contemplated by this bill does not go to the technicalities of rulemaking, rather it is a means to implement basic policy and place ultimate limits upon the discretionary authority of agencies involved in the rulemaking process. In the judgment of the committee this supervision is the responsibility of elected representatives of the people.

The rules issued by federal agencies actually or potentially affect everyone, and they appear to be increasing each year. Repeatedly, in the course of the hearings, witnesses testified to the degree these regulations affect average citizens and result in a considerable degree of governmental interference in their lives.

The Director of the Federal Register outlined the steps of the rulemaking process with particular reference to the Federal Register and pointed out that in 1974, the publication of rules required 10,981 pages of the Register and that by the 30th of September of 1975 there had already been 10,245 rules for that year. The pages required for proposed rules in the same periods were 5,939 for 1974 and 6,094 for 1975 with three months then to go. It was also stated that as of that time the compilation of existing rules in the Code of Federal Regulations required about 60,000 pages.

These figures are important since they serve to indicate the magnitude of rulemaking in our system of government. While public notice and comment rulemaking procedures under the Administrative Procedure Act have proven their value and utility in the thirty years which have passed since enactment of that Act, it is also true that the rulemaking process is in effect an independent aspect of government activity in the sense that the President cannot veto the final rule nor generally can the Congress do anything other than by change in the basic law. This practical independence led one writer to characterize administrative activity as a "fourth branch of government". On the other hand, the very volume of regulations was pointed out by some hearing witnesses as the basis for a conclusion that the Congress could not adequately monitor or evaluate this government activity. The committee feels that this would be a questionable interpretation of congressional function and responsibility. It would also be a startling interpretation if it did not proceed from a misconception of those

functions and responsibilities, for it would infer an inability on the part of Congress to monitor and exercise appropriate legislative oversight and control over administrative power.

The standing committees of the Congress have the experience and competence to perform the functions required under the bill H.R. 12048. In new section 606(b)(1) the bill provides that resolutions are to be referred to such committees. It is provided that they are to be referred "to the standing committee having oversight and legislative responsibility with respect to the promulgating agency".

This committee would be best suited to exercise the necessary review because the subject matter is directly related to its normal legislative work, and the procedures of the bill should provide for more effective oversight. The provisions are carefully drafted so that the normal public notice and comment rulemaking are followed in accordance with the Administrative Procedure Act and other applicable law prior to promulgation of the rule and congressional review.

It should also be recognized that the type of supervision contemplated by this bill can only be performed by the Congress. The executive branch cannot because the President cannot veto administrative rules. Judicial review, particularly as provided for in the Administrative Procedure Act (5 USC 706), is a separate matter. The courts cannot initiate action, but must await the filing of suit, and then must proceed case by case subject to the relatively limited basis followed in administrative review matters. However, most importantly, judicial review would normally not extend to substantive policy considerations as would congressional consideration. Because the procedures provided by this bill would give the Congress the ability to monitor agency rules from the standpoint of its responsibility for legislative policy and the means for congressional action to safeguard against administrative excesses. This need for continuing oversight and vigilance was expressed by Professor Kenneth Culp Davis when he stated that in our form of government the safeguard against tyranny in government rests in "legislative supervision of administration and from our system of judicial review of administrative action.".[1] Thus, it is intended that realistic Congressional oversight over agency rule making as implemented by the procedures of this bill will serve to guard against irresponsible action and the ominous prospect of erosion of our freedoms.

With the procedures provided in this bill, the Congress would have available this ability or reserve authority to take timely and yet constitutionally appropriate action to either require reconsideration of a rule or to disapprove proposed rules when the form and content of such rules are found unsatisfactory, inappropriate or in conflict with basic policy. Such a rule could be disapproved by concurrent resolution under a procedure involving both Houses, or either House could require that an agency reconsider a rule and thereby re-evaluate its provisions. In either event following congressional action the actual rule making process would be conducted by the agency concerned and the new or revised rule would be the product of administrative action of the agency. As was pointed out at the hearings, many regulations

[1] Davis: Administrative Law Text, p. 25.

would not provide a Congressional response involving the consideration of such resolutions. In fact, such consideration would probably be relatively infrequent. It may also be observed that the existence of effective means for Congressional review of rules should provide for an increased degree of cooperation and understanding between the Congress and administrative agencies because of the necessary exchange of information and views that such a review would entail.

The principle of according the legislature a veto over administrative regulations is a part of the laws of several States, including Alaska, Connecticut, Nebraska, Kansas, Michigan, Oregon, Virginia and Wisconsin. The practice is also followed in Great Britain, Australia, New Zealand, and Canada, Legislators from the States of Connecticut and Michigan testified concerning the excellent experience of their respective States in following parallel procedures.

The subcommittee heard from a number of witnesses on the constitutional implications in a procedure for congressional review of rule making as provided for in H.R. 12048. The following excerpt, from a statement by Professor Nathaniel E. Gonzansky and Professor Frank P. Samford of the Law School of Emory University, serves to emphasize the limited scope and basic purpose of a disapproval procedure:

> This seems to be a simple proposal for preventing abuses of the administrative process. It does not seek to strip the agencies of their power but, rather, implicitly recognizes that a modern government would find it very difficult to operate without administrative agencies exercising discretionary authority. Instead, it provides for a modest congressional input into the process. A House of Congress could not on its own amend, modify, or mandate administrative rules; it could only veto a rule and, that, only by means of a resolution passed by the full House or Senate. One would not anticipate that this power would be exercised frequently, although the possibility of its exercise would operate to constrain the agencies in certain instances. If one believes that administrators should be subject to some control by elected officials, this influence can only be regarded as salutary.[2]

The statement referred to specific objections raised by the Department of Justice as to the constitutional implications of the proposed legislation. Professors Gozansky and Samford warned that policy considerations concerning congressional work and procedures incident to exercising review through the consideration of disapproval resolutions should not be confused with objections raised by the Justice Department witness as to constitutionality. The argument concerning constitutionality comes down to two almost mutually exclusive propositions: First, the review procedure would assign executive or judicial functions to the legislative branch of government, and second that congressional action of this type would not be subject to presidential veto. As to the first objection it was pointed out that provisions of this sort do not in fact invade the province of the judiciary since (as is provided in H.R. 12048 in section 607) a failure to act is not to

[2] Hearings, serial 30, page 152.

be taken as an expression of an opinion as to validity. Also congressional action would not be equated to an after-the-fact judicial determination because there would be congressional action prior to the regulation's going into effect. On the second point concerning executive function, it was noted that the power to make rules has the character of legislative action and had been delegated by Congress in the first instance. It would be inconsistent to deny the Congress the limited disapproval authority provided in the bill under these circumstances. The Justice Department witness indicated that the department was opposed to the bills for reasons of practicality and constitutional principle. It was asserted that Article I, Section 7, Clause 3 requires that "Every Order, Resolution, or vote" of the two Houses of Congress shall be presented to the President for approval or disapproval, and contended that the 1787 debates at the Constitutional Convention serve to bolster the interpretation that the Congress could not utilize the procedures of the bills. However, the current edition of the Annotated Constitution prepared by the Congressional Research Service of the Library of Congress comments directly upon such a limited interpretation of congressional power: [3]

PRESENTATION OF RESOLUTIONS

> The sweeping nature of this obviously ill-considered provision is emphasized by the single exception specified to its operation. Actually, it was impossible from the first to give it any such scope. Otherwise the intermediate stages of the legislative process would have been bogged down hopelessly, not to mention the creation of other highly undesirable results. In a report rendered by the Senate Judiciary Committee in 1897 it was shown that the word "necessary" in the clause had come in practice to refer "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the form of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills", which if "enacted" become statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the Houses concurrently with a view to expressing an opinion or to devising a common program of action . . .

The objections made to the congressional review features based on the limited view of the constitution fail to take into account current realities of administrative law and practice. The Supreme Court in the recent case of *Buckley* v. *Valeo* noted that the Framers of the Constitution viewed the separation of powers as a check against tyranny, but significantly, the Court further stated: "But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establisment of a nation capable of govern-

[3] Constitution of the United States of America 1972. Sen. Doc. No. 92-82, U.S. Government Printing Office.

ing itself effectively".[4] The argument that congressional review and possible disapproval of agency regulations somehow assigns executive or judicial functions to the legislative branch of government really requires an assumption that all governmental acts must be classified as executive, legislative, or judicial and reserved only to the branch of government having that specific responsibility. This does not square with the realities of practice and procedure of administrative agencies, for these agencies clearly perform functions that are executive, judicial, and legislative in character.

Professor Kenneth Culp Davis commented as follows in his work on Administartive Law: [5]

> Perhaps the most significant twentieth-century change in the fundamentals of the legal system has been the tremendous growth of discretionary power. And the prospect is, for better or for worse, that discretionary power will continue to grow. The three main reasons for the continued increase of discretion are that (1) our governments—federal, state, and local—are likely to go on undertaking tasks for the execution of which no one is able to prepare advance rules, (2) even when we have capacity to formulate rules discretion is often desirable for individual justice, and (3) in this country we have developed a habit of allowing discretionary power to grow which far exceeds what is necessary and which is much less controlled than it should be.
>
> What we need to do is to work on the third reason. We should reject the extravagant version of the rule of law in favor of a milder version that can be much more effective in protecting the interests of justice. We should not try to eliminate all discretion; we should try to eliminate unnecessary discretion.
>
> We should adopt a sound meaning of the rule of law—that discretionary power should be eliminated or controlled to whatever extent it can be eliminated or controlled without undue sacrifice of other values that we may deem important.

This, then, is what is intended by the congressional review provisions contained in this bill. The aim is not to eliminate the executive discretion necessary to carry into effect the policies of the laws enacted by Congress, but it is intended to be a practical means to control such exercise as manifested in rule making to the degree that the agencies be required to submit regulations to the Congress for review and possible disapproval.

Basically, the Constitution provides that legislative powers are vested in the Congress, executive powers in a President and that judicial power is to be vested in a Supreme Court and in inferior courts. However, the Constitution does not contain a specific provision that the three types of powers are to be kept separate. As has been noted administrative agencies exercise powers that are executive, legislative, and judicial. The Supreme Court referred to this mixture of functions in the case of *Humphrey's Executor* v. *United States*, 295

[4] *Buckley* v. *Valeo*, United States Supreme Court Nos. 75-436, 75-437, decided January 30, 1976, p. 115, ——— U.S. ———.
[5] Davis, Administrative Law Text 1972, p. 22.

U.S. 602, 628 (1935) in commenting on the Federal Trade Commission:

> To the extent that it exercises any executive functions—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

A somewhat similar observation was made by Mr. Justice Jackson in the case of *F.T.C.* v. *Ruberoid Co.* 343 US 470, 487–488:

> Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial. As the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution.

Kenneth Culp Davis observed that the protection against tyranny comes, not from separating the powers, but from our system of legislative supervision of administration and from our system of judicial review of administrative action. Professor Davis' comment was [6]—

> In our theoretical discussion we should frankly recognize that we have abandoned the basic idea that executive legislation and judicial power should be separated from each other in order to protect against tyranny. We purposefully combine the three kinds of powers in particular agencies. The protection against tyranny comes, not from separating the powers, but from our system of legislative supervision of administration and from our system of judicial review of administrative action.

In discussing congressional review of rule making, Professor Louis L. Jaffe stated "It provides at best an institutional basis for calling into question some particularly controversial determination. If it is to function intelligently, it should be referred to a standing committee familiar with the department whose rules are in question rather than to a general rules committee." [7]

The procedures for congressional review of agency regulations provided in H.R. 12048 are intended to apply in light of modern realities. First of all the review relates to rule making, that aspect of administrative procedure that is obviously legislative in character and the activity most involved with the definition of policy. The determination made in rule making could be made in the first instance by Congress itself. Since this power has been delegated to administrators by Congress it would be anomalous if the Congress were prevented from exercising the limited oversight and option to disapprove regulations contemplated by this bill. This is quite a different thing than the exercise of a recognized executive function. This does not involve an attempt to dictate content or to participate in rule making procedures. The congressional review would occur after completion of statutory rulemaking procedures, and the only action which could be taken would be for the Congress to disapprove a proposed rule by concurrent resolution or for a single House to require an agency to reconsider a rule and repromulgate the rule following the same statutory rule-

[6] Davis: Administrative Law Text, p. 25.
[7] Jaffee: Judicial Control of Administrative Action (1965) p. 46.

making procedures. Thus the administrative functions associated with rule making are separate from the limited right of review accorded Congress by this bill.

The concurring opinion of Justice White in the case of *Buckley* v. *Valeo* commented upon the procedure for congressional review of regulations as provided in section 316(c) of the amended Federal Election Campaign Act of 1971 (2 U.S.C. § 438(c)). The provisions of that statute provided for disapproval of a proposed rule by one House of Congress, and Justice White held that otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power by a statutory provision subjecting agency regulations to disapproval by either House of Congress. His opinion stated in this connection:

> If the FEC members had been nominated by the President and confirmed by the Senate as provided in Art. II, nothing in the Constitution would prohibit Congress from empowering the Commission to issue rules and regulations without later participation by, or consent of, the President or Congress with respect to any particular rule or regulation or initially to adjudicate questions of fact in accordance with a proper interpretation of the statute. *Sunshine Coal Co.* v. *Adkins*, *supra; RFC* v. *Bankers Trust Co.*, 318 U.S. 163 (1943); *Humphrey's Executor* v. *United States*, *supra.* The President must sign the statute creating the rulemaking authority of the agency or it must have been passed over his veto, and he must have nominated the members of the agency in accordance with Art. II; but agency regulations issued in accordance with the statute are not subject to his veto even though they may be substantive in character and have the force of law.
>
> I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress. For a bill to become law it must have passed both Houses and be signed by the President or passed over his veto. Also, "every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary . . ." is likewise subject to the veto power. Under § 438(c) the FEC's regulations are subject to disapproval; but for a regulation to become effective, neither House need approve it, pass it, or take any action at all with repsect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view the power of either House to disapprove as equivalent to legislation or to an order, resolution or vote requiring the concurrence of both Houses.
>
> In terms of the substantive content of regulations and the degree of congressional influence over agency law-making, I do not suggest that there is no difference between the situa-

> tion where regulations are subject to disapproval by Congress and the situation where the agency need not run the congressional gantlet. But the President's veto power, which gives him an important role in the legislative proces, was obviously not considered an inherently *executive* function. Nor was its principal aim to provide another check against poor legislation. The major purpose of the veto power appears to have been to shore up the Executive Branch and to provide it with same bargaining and survival power against what the Framers feared would be the overweening power of legislators. As Hamilton said, the veto power was to provide a defense against the legislative department's intrusion on the rights and powers of other departments; without such power, "the legislative and executive powers might speedily come to be blended in the same hands."
>
> I would be much more concerned if Congress purported to usurp the functions of law enforcement, to control the outcome of particular adjudications, or to pre-empt the President's appointment power; but in the light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto. It would be considerably different if Congress itself purported to adopt and propound regulations by the action of both Houses. But here no action of either House is required for the agency rule to go into effect and the veto power of the President does not appear to be implicated.[8]

The foregoing quotation refers to a recent statute embodying a provision for congressional review and disapproval of regulations similar to that provided for, on a general basis, in the bill H.R. 12048. At the subcommittee hearings on the earlier bills in October and November of last year, numerous references were made to statutory provisions for congressional authority of this type. Such provisions have been included in federal legislation at least 183 times in 126 different acts of Congress in the last 43 years.[9] Of course, the Library of Congress compilation which provided the basis for those figures includes a wide range of statutory provisions, many of them much different from the limited mechanism of review provided for in this bill; still it does show that the concept of congressional oversight and review embodied in this bill is based on congressional practice of long standing.

Definition of Rule as Proposed in the Bill

Section 2 of the bill provides for a change in the definition of "rule" as contained in the Administrative Procedure Act provisions of section 551 of title 5 of the United States Code.

Subsection (a) of section 2 amends the definition of "rule" to exclude agency statements of particular applicability. That is, state-

[8] Concurring Opinion of Justice Wright in the case of *Buckley* v. *Valeo,* Nos. 75–436, 75–437, pp. 27–30.

[9] Hearings. Serial 30, page 154. Statement of Professors Gonzansky and Samford citing: Library of Congress Congressional Research Service. "Congressional Review, Deferral, and Disapproval of Executive Actions. A Summary and Inventory of Statutory Authority."

ments applicable to named or similarly specified parties, and to delete that part of the definition which classifies any agency approval or prescription for the future rates, wages, corporate structures, etc. as a rule. The result will be to classify all actions of particular applicability as "orders" and the process for taking such actions as "adjudication". The change in the language of this definition is based upon the recommendation of the American Bar Association originally approved by that organization in 1970. In 1973, this recommendation was also approved by the Administrative Conference.

As was observed in the American Bar Association comment accompanying the recommended change, the present definition of "rule" in section 551 has the effect of including within the "rulemaking" category those governmental functions which historically were considered legislative in nature.

Experience under the Administrative Procedure Act since its enactment in 1946 with the present definition of rule and rulemaking, has shown that the distinction between rulemaking and adjudication based on a concept which divides administrative proceedings according to government functions which were historically legislative or judicial in nature is not appropriate where both functions are commonly performed by a single administrative agency. A more useful distinction would be that provided in this bill which makes the distinction between proceedings having general applicability and those which do not. Proceedings having general applicability are those in which the members of the public affected can be described as a class but cannot be identified because the proceedings deal with future members of the class rather than with present or past members of a class. In all other administrative proceedings, it is possible to identify all of the members of the public affected. They are either named in a proceeding of particular applicability or they represent the past or present members of a class who can be so identified. The revised definition in the amendment added by this bill will provide for a distinction based upon this functional distinction between proceedings.

In commenting upon the revised definition of "rule", the Administrative Conference noted that a matter may be considered to be of "general applicability" even though it is directly applicable to a class which consists of only one or a few persons if the class is open in the sense that in the future the number of members of the class may be increased. Thus, for example, smoke emission standards for a particular area are of general applicability even though at the time of their issuance they may, as a practical matter, be applicable to only one plant. On the other hand, a rate established for a single company on the basis of the capital requirements and credit rating of that company, and applicable only to that company would be a matter of particular applicability and an order rather than a rule. On the other hand the Conference pointed out that a matter may be of "particular applicability" (and therefore an order) even though it is applicable to several persons, if the agency clearly specifies an intention to limit its applicability to the particular persons concerned.

The deletion of the material in the second clause of section 551(4), that is the language referred to above which states the reference to "* * * the approval or prescription for the future of rates, wages, corporate, or financial structures or reorganizations thereof, prices, facilities, appliances, services of allowances therefor, or of evaluations, costs, or accounting, or practices bearing on any of the foregoing.",

and its transfer to a new definition in section 551(6) for "ratemaking and cognate procedings" does not imply a determination that the agency statements therein listed are not rules, but rather that they may be either rules or orders, depending upon their applicability and effect. If such statements become orders under the revised definition and are required by statute to be determined on the record after opportunity for agency hearing, they may still be accorded a special status as to the separation of functions requirements of 5 USC § 554(d). The bill in section 2 (d) and (e) would amend existing law by inserting a reference to "ratemaking and cognate proceedings" in section 556(d) of title 5 and the same reference in section 557(b). These two amendments will permit the continued utilization of the procedural devices of the submission of written evidence and the omission of an initial or recommended decision of an administrative law judge in connection with ratemaking and cognate proceedings under sections 556 and 557 of the Administrative Procedure Act.

Emergency Rules

Section 2(a)(2) of the bill in amended section 551 provides for a new paragraph (5) defining "emergency rule". This provides for a rule of temporary effectiveness which may be promulgated without being subject to the normal periods for public notice and comment when an agency finds that a delay in putting the rule into effect would—

(A) seriously injure an important public interest,
(B) substantially frustrate legislative policies, or
(C) seriously damage a person or class of persons without serving any important public interest;

An emergency rule would, therefore, be available to agencies in situations fitting the above criteria and where the emergency rule would be in effect while normal procedures are followed for notice and comment rulemaking and congressional review of a proposed rule.

Amendments to Section 553 of Title 5 of the United States Code

The bill H.R. 12048 provides for a series of amendments to section 553 of title 5 which is the section of the Administrative Procedure Act which governs rulemaking. The section provides for public notice of proposed rulemaking and for participation by the public in that rulemaking through the submission of written comments, the amendments added by this bill are intended to increase the opportunity for public participation in rulemaking and to make necessary changes in the section to conform its provisions to those of new chapter 6 of title 5 on congressional review of rulemaking also provided for in the bill.

Amendment of the Exemptions Applicable to Military and Foreign Affairs Functions

Subsection (a) of section 553 of title 5 provides exemptions to the rulemaking provisions of the section. The first exemption in section 553(a)(1) is for "a military or foreign affairs function of the United States". In 1970 the American Bar Association recommended that the exemption be revised so that normal notice and comment rulemaking

procedures would apply except as to "rulemaking which is specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy". The Administrative Conference, in a recommendation adopted December 18, 1973, recommended the elimination of the present categorical exemption from general procedural requirements relating to rulemaking. In its place it was recommended that where rulemaking involves matters in which the usual procedures are inappropriate because of a need for secrecy in the interest of national defense of foreign policy, that rulemaking should be exempted on the same basis now applied in the freedom of information provision, 5 U.S.C. § 552(b)(1). The Administrative Conference recommendation was that Section 553(a) should be amended to contain an exemption for rulemaking involving matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy. The language of the bill follows this suggestion with the addition that the matter is "specifically authorized under criteria established" by Executive order to be kept secret as above. The bill also adds an additional requirement that the matter be "in fact properly classified pursuant to such Executive Order". Accordingly, the bill would exempt:

> (1) a matter pertaining to a military or foreign affairs function of the United States that is (A) specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order; or

Section 552(b)(1) referred to above contains provisions added by the Freedom of Information Act in 1967, as further amended in 1974 by Public Law 93–502. Thus, the language of the amendment provided for in this bill is consistent with these earlier amendments to the Administrative Procedure Act.

The provision in H.R. 12048 modifying the exemption for military and foreign affairs functions in section 553(a)(1) is identical to that contained in the bill H.R. 10194 which was one of several bills concerning amendments to the Administrative Procedure Act which were the subject of a hearing before the Subcommittee on Administrative Law and Governmental Relations on December 4, 1975. At that hearing, representatives of the Administrative Conference and the American Bar Association appeared and reiterated the support of the Conference and the American Bar Association for the amendment of this exemption. In the comments of the Department of Defense submitted in connection with the bill H.R. 10194, that department questioned the amendment on the ground that it was premature. The Department stated that after many years of operation subject to the exemption it had recently adopted procedures for public participation in rulemaking having direct and substantial public impact, 32 CFR Part 296; 40 F.R. 4911 (February 3, 1975).

The committee is gratified that the need for public participation has been recognized in this manner, but still has concluded that the most direct and practical method for promoting such participation is for normal notice and comment rulemaking to be followed under the Administrative Procedure Act subject to the safeguards for

secrecy as necessary as provided in this bill. The Defense Department noted that the language for the safeguarding of matter required to be kept secret was drawn from the 1974 Amendments to the freedom of information provisions of the Administrative Procedure Act. While the department raises a question as to the procedures for classification, it is felt by the committee that the language provides sufficient flexibility to permit adequate protection for classified matters.

The State Department in its comments on the bill H.R. 10194 which are appended to this report indicated that in 1973, it had voluntarily undertook to invite public participation in rulemaking. It also stated that in following those procedures there had been no occasions when the foreign affairs exemption had been invoked.

Elimination of the Exemptions for Matters Relating to Public Property, Loans, Grants, Benefits, and Contracts

The bill would eliminate the present rulemaking exceptions for public property, loans, grants, benefits or contracts now contained in section 553(a)(2) of title 5. Here again the purpose is to provide increased public participation in the rulemaking process under the proven procedures for public notice and comment under the Administrative Procedure Act.

In 1941, prior to the enactment of the Administrative Procedure Act, the Attorney General's Committee on Administrative Procedure concluded that the rulemaking processes of federal agencies should be adopted to give persons adequate opportunity to present their views.[10] That Committee in its report viewed public participation in the rulemaking process as essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests.[11]

It was further pointed out that public participation assists agencies in rulemaking in that it is a means for obtaining "the information, facts and probabilities which are necessary to fair and intelligent action".[12] This committee has concluded that thirty years of experience under the Administrative Procedure Act have proven the wisdom and practicality of this principal and that the time has come for an extension of such notice and comment procedures to matters relating to public property, loans, grants, benefits and contracts.

In a recommendation adopted on October 22, 1969, the Administrative Conference recommended the elimination of these exemptions. It was pointed out that rules relating to these subjects may bear heavily on nongovernmental interests.

As has been noted, the provisions in sections 1 and 2 of the bill, H.R. 12048, include provisions similar to those included in the bill, H.R. 10194. The provisions in section 3 in providing for the revision of section 553 provide for the revision of the exception concerning military and foreign affairs functions and the elimination of the categorical exceptions for public loans, grants, benefits and contracts. At the hearing on that bill held on December 4, 1975, Mr. Richard Berg,

[10] Final Report of the Attorney General's Committee on Administrative Procedure (1941).
[11] Id. 103.
[12] Id. 102.

Executive Secretary of the Administrative Conference, stated that the two proposals implemented in the bill H.R. 10194 were those on which there is entire agreement between the American Bar Association and the Administrative Conference. With particular reference to the exceptions here being discussed, he noted that the bill would delete entirely these so called proprietary exemptions.

In a report on the bill H.R. 10194, the Department of Defense in commenting on the removal of these exemptions noted that the Commission on Government Procurement had found that the varied practices followed in soliciting comments on proposed procurement regulations do not meet minimum standards for promoting fair dealing and equitable relationships among parties in Government contracting. However, that Commission came to a different conclusion than the American Bar Association and the Administrative Conference as to the application of the Administrative Procedure Act to rulemaking applicable to procurement. The Defense Department pointed out that the Procurement Commission favored that an office of Federal Procurement Policy establish other criteria for the development of procurement regulations. A report received by the Committee from the Office of Procurement Policy similarly questions removal of the exemptions. That office also noted that the removal of the listed exemptions would in addition to contracts subject to statutory rulemaking procedures matters relating to public property loans, grants, and benefits. The Office of Federal Procurement Policy asserts that these matters become closely interrelated with the procurement process. It noted that the Commission on Government Procurement had found much confusion between grant-type assistance matters and procurement matters, grants and contracts being used interchangeably in some cases. That Office observed that there were complexities involved in the situation and concluded:

> Thus, as regards Federal procurement today, matters relating to public property, grants and contracts are no longer discrete and distinguishable, and the statutory exemption should be retained for public property and grants, as well as for contracts.

This committee feels that these arguments point up an obvious need for repeal of the exemptions rather than their retention as urged in these departmental comments. At the hearings, the difficulties faced by persons dealing with the government in the areas referred to by the Office of Procurement Policy were discussed by a number of witnesses. It was urged that the exemptions for loans, grants, and contracts be deleted along with other appeals which can best be summarized as appeals from affected individuals and organizations for a voice and a meaningful input into the process of evolving regulations. It is relevant to note the specific point raised in the testimony of the witness representing the American Bar Association at the hearing on H.R. 10194 on December 4, 1975 as regards Defense Department procurement regulations. The prepared statement of Mr. William Warfield Ross of the Administrative Law Section of that Association included the following observation:

> One of the current exceptions permits agencies to omit notice and comment on rules relating to "public property,

loans, grants, benefits, or contracts." The ABA proposal would eliminate this so-called "proprietary exemption."

Under the present exemption, the Defense Department promulgates bidding procedures for billions of dollars of contracts without providing contractors or anyone else an opportunity to comment. The result is that rules are sometimes adopted which are either unfair or unworkable or both because they do not take account of relevant matters not known to the issuing agency. There is nothing inherently secret about these procedures and there is therefore, every reason to subject them to public comment just like other agency rules.[13]

Other Amendments to Section 553 Relative to Public Notice and Comment in Rule Making

The provisions of section 553(b) presently provide that general notice of proposed rule making shall be published in the Federal Register unless they are personally served or have actual notice. This language is retained in revised 553(b)(1), but the revised language includes an additional requirement which is intended to alert persons likely to be affected to the fact that the procedures for proposed rule making have been initiated. The revised language requires agencies, in addition to giving the statutory notice, to make "a reasonable attempt to inform those likely to be affected by the proposed rule making. In the case of large groups, the requirement is to inform representative members of the proceeding. Agencies could utilize available publications such as trade journals or financial newspapers where appropriate. It could be that the sending of news releases would serve to perfrom this function.

The notice requirements now set forth in section 553(b) is substantially retained in revised section 553(b)(2) with additional requirements which are intended to better inform the public concerning the proposed rule making. In addition to the present requirement of a statement of the time, place and nature of the rulemaking proceedings, the projected effective date of the rules is to be included. A new requirement of a brief statement of the purpose of the proposed rule is included along with the existing provision for a reference to the legal authority for the proposed rule. In order to give the public a better understanding of the scope and content of the rulemaking proceeding, there would be a description of the subjects with which the rule making will deal and the major issues it will raise.

At the hearings in October and November of last year, there were some comments that persons commenting on rulemaking proceedings had at times encountered difficulty in commenting on the substance of a particular rule because of a lack of clarity concerning the content of the rule or because its ultimate provisions were quite different from those expected in the course o fthe comment proceeding. New section 553b(2)2(D) deals with the problem by requiring that the notice include the text of the proposed rule, if available. If omitted the text would be subsequently made known through a subsequent notice.

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[13] Judiciary Hearings on H.R. 10194 and related measures, December 4, 1975, Serial 29, page 37.

Some commentators have noted the difficulties encountered in some rulemaking proceedings where the nature of the subject matter is such that the agency will place considerable reliance on technical, theoretical, or empirical studies. Thus, it is assumed that in the notice stage of the rulemaking process, the public will be aware of important advice received from experts, and of the critical experimental and methodological techniques on which the agency intends to rely.[14] Thus the agency should not rely on any research methods or data not presented to interested parties for comment and criticism.[15]

The exceptions to subsection (b) of present 553 are presently found in that subsection as follows:

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The exceptions to the notice and comment procedures in the revised section are set out in new section 553(b)(3). It is there provided that, except as otherwise required by statute, subsection (b) and paragraphs (1) [Notice], (2) [Comment], and (3) [Factual determinations] of subsection (c) do not apply to the enumerated subjects. The present exception for rules of agency organization, procedure, or practice is retained. However, the exceptions for "interpretative rules" and "general statements of policy" are not contained in the revised language.

Similarly, the language of (B) in the present subsection has been revised to eliminate the so-called "good cause exception." In its place is a more limited exception which would permit an agency to omit notice and comment when it finds that notice and comment are unnecessary due to the routine nature or the insignificant impact of the proposed rule. The other exception provided is a new one and relates to emergency rules when an agency finds that they should be promulgated. It should be noted that while the emergency rule procedure might in some instances be utilized in lieu of the present "good cause" exception, notice and comment would be required in connection with the proposed rule which would be required to be promulgated to replace the emergency rule. (See revised section 553(f) as contained in the bill.) In paragraph 4 of subsection (b), it is made clear that agencies are free to invite suggestions as to the content of proposed rules prior to notice of rulemaking.

Subsection (c) of section 553 is revised to provide, in four subparagraphs, the requirements concerning the public comment stage of the rulemaking process, and there is included a specific requirement for a rulemaking file. Subparagraph (1) provides for a period of not less than 45 days after notice to participate in the rule making. This

[14] J. Skelly Wright: The Courts and the Rulemaking Process; the Limits of Judicial Review, Cornell Law Review, March 1974.
[15] Id. note 34 at p. 383.

period actually increases the minimum period for such participation which is now based on the provision in the Federal Register Act, 44 USC 1501–1511 which provides for a minimum period of 15 days.

Paragraph (2) of subsection (c) provides for written statements much as in present subsection (c). Provision is made for oral presentation with more detail than in the present statute as to the authority of agencies to hold hearings for that purpose. It is further stated that the head of an agency, one or more of the members of the body which comprises the agency or "one or more agency employees assigned the responsibility of recommending changes in the proposed rule shall preside at any such hearing."

As has been indicated above, subparagraph (3) of new subsection (c) concerns resolution of factual issues. It is provided that when an agency determines that there is a significant controversy over a factual issue which will have a material effect on the substance of the rule, it shall use an appropriate procedure for the resolution of that issue. The language of the paragraph is consistent with the flexibility of informal rule making in that the agency is to select a procedure for that resolution which will permit adequate presentation of differing points of view, provide for agency objectivity and shall not unduly delay the rulemaking.

New paragraph (4) of revised subsection (c) provides that the agency maintain a file of each rulemaking proceeding. The file must include the notice of the proposed rule making and any supplemental notice, all comments received in connection with it, and transcripts of hearings or supplemental proceedings on controverted views of fact. Also included would be studies, reports or the material considered by the agency in formulating the rule, and other material deemed relevant or required by law. The file would contain the rule and statements required by the agency in formulating the rule. Finally, the file would contain copies of petitions for exceptions to, amendments of, or repeal of a rule. This file would be available to the courts and the Congress in reviewing the rule, and to the public as provided by law.

New subsection (d) of revised section 553 contains additional requirements to inform the public concerning adopted rules. The new subsection restates the present requirement of present subsection 553 (c) that an agency incorporate in an adopted rule a statement of the basis and purpose of the rule. The new subsection (d) covers this subject by requiring a statement of the purpose of the rule, the legal authority for the rule, and any other statements required by law. When the rule is adopted, the agency is to place a statement in the rulemaking file which sets forth the primary considerations asserted by persons outside the agency in opposition to the rule as adopted together with brief explanations of the reasons for their rejections.

New subsection (d) (2) would bar adoption of a rule "substantially different" from the proposed rule unless interested persons were apprised of the differences and given an opportunity to comment, or the agency gives notice as provided in section 553(b) (2) (D) concerning notice including text of a proposed rule and receives comments and the differences from the original proposed rule. At the hearing on October 29, 1975, it was pointed out that it was possible for a rule to be adopted which was substantially different from the proposed rule upon which comments were received. Procedures permitting comment on the substance of all proposed rules would more nearly assure fair-

ness and protect the rights of the public which is fundamental to the process of informal rulemaking. It is felt the provisions of subsection (d) (2) will accomplish this purpose.

New subsection (c) is a revision of present subsection (d) now providing exceptions to the present 30 day minimum delay in effect date of rules. The revised subsection (c) would provide for immediate effectiveness for rules granting or recognizing an exemption or relieving a restriction. It would also provide for immediate effectiveness for rules of agency organization, practice or procedure and rules which are of "routine nature" or have "insignificant impact". Emergency rules as defined in new paragraph (5) added by the bill to section 551 of title 5, could also be made effective immediately As to other rules, the effective date would be governed by sections 602(a) and 603(b) in new chapter 6 on Congressional review of rule making added to title 5 of the bill.

Subsection (f) concerns the commencement of rulemaking procedures upon issuance of an emergency rule. There is a limit of 60 days for public comment with provision for an additional 30 days if found necessary. The rule is then to be issued within 30 days. Unless earlier withdrawn, and emergency rule will expire upon the effective date of the final rule or after 210 days, whichever occurs first.

Subsection (g) provides that when rules by statute are required to be made on the record after hearing, sections 556 and 557 are to apply to significant issues of fact in dispute, instead of subsections (b), (c) and (d) of revised section 553. Present subsection (c) has similar language but does not have the reference to "significant issues of fact in dispute". This provision means that the more formal hearing procedures of section 556 are to apply in this manner as are the provisions of section 557 to hearings governed by the other section.

Subsection (h) is essentially a restatement of present subsection (g) requiring each agency to give interested persons the right to petition for a rule's issuance, amendment or repeal.

Subsection (i) provides language somewhat similar to that found in the Federal Register Act (44 USC 1507) and the Freedom of Information Act (5 USC 552) as to the effect of a rule which fails to comply with the section. The language of the subsection would provide that unless falling within an exception, a rule not adopted in conformity with section 553 cannot be admitted into evidence or considered in any agency proceeding, or in any judicial review of that proceeding, nor would any person be required to resort to or be adversely affected by such a rule. However these provisions are not to be interpreted as preventing a person from interposing such a rule as a defense to an agency proceeding or to a criminal prosecution, or from seeking agency or judicial review of the rule.

Committee Vote

On March 16, 1976, the Full Committee on the Judiciary approved the bill H.R. 12048 by voice vote.

Cost

(Rule XII (7) (a) (1) of the House Rules)

The bill would add a new section 608 to title 5 authorizing an appropriation of $200,000 for an administrative conference study of

congressional review of rule making. The bill does not provide for any specific new government programs. As has been outlined in the report, the bill concerns amendments to the law concerning administrative procedure and adds new language concerning procedures to be followed by the Congress in reviewing agency rule making. Except as indicated in the attached estimate of the Congressional Budget Office, it is not contemplated that those procedural changes will add any significant cost to goverment activity.

Conclusion

The Committee has concluded that the facts developed in the hearings on the bill and as outlined in this report demonstrate the need for legislative action with reference to rule making and to provide for effective means for congressional review of agency rule making. It is recommended that the amended bill be considered favorably.

Statement Under Clause 2(l)(3) and Clause 2(l)(4) of Rule XI of the Rules of the House of Representatives

A. oversight statement

This report embodies the findings and recommendations of the Subcommittee on Administrative Law and Governmental Relations pursuant to its oversight responsibility over administrative actions of the Federal Government and its jurisdiction over the Administrative Procedure Act as codified in title 5, United States Code, pursuant to the procedures relating to oversight under Rule VI(6) of the Rules of the Committee on the Judiciary, and the committee has determined that legislation should be enacted as set forth in the amended bill.

B. budget statement

As has been indicated in the committee statement as to cost made pursuant to Rule XIII(7)(a)(1) the bill would add a new section 608 to title 5 authorizing $200,000 for an Administrative Conference study of congressional review of agency rules as provided for in the bill. Other than that the bill concerns administrative procedures and congressional review procedures which would not involve new budget authority or require new or increased tax expenditures as contemplated by Clause 2(l)(3)(B) of Rule XI.

C. estimate of the congressional budget office

The estimate or comparison was received from the Director of the Congressional Budget Office as referred to in subdivision (C) of Clause 2(l)(3) of House XI, is as follows:

Congress of the United States,
Congressional Budget Office,
Washington, D.C., April 2, 1976.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared

the attached cost estimate for H.R. 12048, Administrative Rule Making Reform Act.

Should the Committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

APRIL 2, 1976.

1. Bill Number: H.R. 12048.
2. Bill Title: Administrative Rule Making Reform Act.
3. Purpose of Bill: The bill establishes procedures for both public participation and Congressional review of agency regulations. These review procedures do not apply to sensitive military or foreign affairs matters, nor to regulations relating to agency management or personnel. The bill also creates an administrative conference to study the effects of Congressional review activity. This is an authorization bill that requires subsequent appropriation action.
4. Cost Estimate: The costs, which are summarized in the table below, are primarily for additional Congressional Committee staffs and the administrative conference.

COSTS

	Fiscal year—				
	1977	1978	1979	1980	1981
Administrative conference	33,000	33,000	33,000	33,000	33,000
Congressional staff	141,600	150,550	158,322	166,606	174,960
Total	174,600	183,550	191,322	199,606	207,960

5. Basis for Estimate: Committee staff costs were based on the assumption of a review of agency regulations for 100 bills. It was estimated that committee review and regulation hearings would average approximately 48 working hours, i.e., 24 hours for 2 committee staff members. Under these assumptions, it was estimated that 3 additional committee staff members would be needed in both the House and the Senate. The $200,000 authorization for the administrative study was amortized equally over six years, i.e., until FY 1982, the expected year of the final report. Although additional staff costs could also be attributed to agencies in conducting public hearings, these costs were considered to be marginal since the 100 bills will be distributed over a large number of responsible agencies.
6. Estimate Comparison: None.
7. Previous CBO Estimate: None.
8. Estimate Prepared By: James V. Manaro (225–5275).
9. Estimate Approved by: ——— ———, for James L. Blum, Assistant Director for Budget Analysis.

D. Oversight Findings and Recommendations of the Committee on Government Operations

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(l)(3) of House Rule XI.

Inflationary Impact

In compliance with clause 2(l)(4) of House Rule XI it is stated that enactment of this legislation will have no inflationary impact on prices and costs in the operation of the national economy. The bill provides for the procedural matters referred to above. It does not provide for any new programs.

Departmental Reports on Bills Concerning Congressional Review of Rulemaking

The General Counsel of the Treasury,
Washington, D.C., March 29, 1976.

Hon. Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

Dear Mr. Chairman: This Department would like to submit a voluntary report on H.R. 12048, "Amending title 5 of the United States Code to improve agency rule making by expanding the opportunities for public participation, by creating procedures for congressional review of agency rules, and by expanding judicial review, and for other purposes."

The bill would completely revise the agency rule making authority contained in 5 U.S.C. 553. In addition, it would add a new chapter 6 to title 5 of the U.S. Code, providing for congressional review of agency rule making. Essentially, this new chapter would provide the Congress with a mechanism for overturning rules and regulations promulgated by agencies under their own authorities or the Administrative Procedure Act (5 U.S.C. 500 *et. seq.*). Under the bill, either House of Congress could institute action against a rule. The rule would be overturned if the first House to act disapproved the rule within 60 days, and the other House voted similarly or not at all within the next 30 days. Short of overturning a rule, the Congress, by simple resolution, could send a rule back to the originating agency for reconsideration. The agency would then have 60 days to resubmit the rule to Congress, which would decide whether to accept or overturn it. The bill also provides that the Congress could overturn existing rules, as well as new ones, and that the President could not veto the overturning of such a rule.

The bill would seem to raise serious constitutional questions under the doctrine of separation of powers, in that the authority for congressional review of rulemaking restricts the effective discharge of the executive function. *Cf. United States* v. *Nixon*, 418 U.S. 683, 711 (1974); *Myers* v. *United States*, 272 U.S. 52, 131, 164 (1926). Article II of the Constitution empowers the executive branch to administer the laws. Inherent in this responsibility is the promulgation of rules and regulations implementing the laws passed by Congress. We believe

the proposed congressional review procedure would seriously impinge on the President's constitutional responsibility under section 3, Article II to see that the laws be faithfully executed.

Moreover, in our view the courts are the appropriate forum to judge the administrative interpretations of laws enacted by the Congress. As Chief Justice Marshall said in *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." The bill, in effect, would make Congress a court of initial review. In usurping both executive and judicial functions, it would derogate against the tripartite form of government contemplated by the Constitution.

Congress first delegated rule making powers to the agencies because it lacked the time, expertise and inclination to promulgate detailed and complex agency rules for implementation of statutes. A requirement for prior congressional review of agency rule making would substantially undermine and defeat the flexibility intended in vesting such authority in an executive agency.

Finally, to insure that administratively promulgated rules are desirable, necessary and legitimate exercises of an agency's statutory authority, present section 553 of the APA requires that public notice be given of proposed rule making and that interested persons be given an apportunity to participate—either orally or in writing—in rule making. Judicial review of final agency action is provided for in the APA in chapter 7, 5 U.S.C. 701, *et seq.* While the Department recognizes that there may be a need for reform in some of the existing procedures, it believes that the proposed legislation would make agency rule making more time consuming and complicated and less effective. More importantly, as stated, we believe that the bill raises serious constitutional questions concerning the doctrine of separation of powers, and that the courts are the appropriate forum to decide whether an agency has exceeded its organic statutory authority or acted in rule making in a manner contrary to law.

For the foregoing reasons, this Department is strongly opposed to H.R. 12048.

The Department has been advised by the Office of Management and Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

RICHARD R. ALBRECHT,
General Counsel.

FEDERAL POWER COMMISSION,
Washington, D.C., April 6, 1976.

Subject: H.R. 12048—94th Congress, "Amending title 5 of the United States Code to improve agency rule making by extending the opportunities for public participation, by creating procedures for congressional review of agency rules, and by expanding judicial review, and for other purposes."

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: H.R. 12048 was recently referred to your Committee. The bill has a serious adverse impact on this agency, and

so we submit the attached report even though we have not as yet been asked to do so by your Committee.

The Office of Management and Budget advises that it has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely yours,

RICHARD L. DUNHAM,
Chairman.

Enclosure: Four copies of FPC report on H.R. 12048.

FEDERAL POWER COMMISSION REPORT ON H.R. 12048, 94TH CONGRESS

A bill Amending title 5 of the United States Code to improve agency rule making by expanding the opportunities for public participation, by creating procedures for congressional review of agency rules, and by expanding judicial review, and for other purposes.

The bill revises the rulemaking provisions of the Administrative Procedure Act 5 U.S.C. 551, *et seq.* which govern rulemaking proceedings in the Federal Power Commission.

The Federal Power Commission has used rulemaking procedures to fulfill many of its responsibilities under the Natural Gas Act and the Federal Power Act, including proceedings to implement, interpret or prescribe law or policy, proceedings relating to Commission procedure and practice, proceedings relating to the corporate or financial structure of regulated utilities, to accounting practices and rate proceedings. The procedures presently followed by the Commission in these rulemaking proceedings are designed to afford any interested person opportunity to participate in the Commission's rulemakings. The Commission has found the rulemaking procedure to be efficient and expeditious. We agree with the proponents of this bill that the public should be provided adequate opportunities to participate in rulemaking by federal agencies. We believe that the present procedures afford interested parties an opportunity to present any arguments or data they would like to have considered prior to adoption of a rule. We do not believe the proposed new procedures would substantially improve or increase participation of the public and interested parties in our proceedings. On the other hand, we are concerned that enactment of H.R. 12048 would severely handicap the Commission in the future conduct of its regulatory responsibilities through rulemaking which would result in a detriment rather than a benefit to the public interest. We, therefore, recommend against enactment of the bill. We are particularly opposed to the following changes which would be dictated by enactment of H.R. 12048.

1. Section 2 of the bill would amend the definition of "rule" in Section 551 of title 5, U.S.C., by deleting that part of the definition which classifies any agency approval or prescription for the future of rates, wages, corporate structures, etc., as a rule and would establish a new classification "ratemaking and cognate proceedings." Sections 556(d) and 557(b) are amended to permit the continued use in ratemaking and cognate proceedings of two procedural devices available in rulemaking, submission of written evidence and omission of an initial or recommended decision of an administrative law judge.

Pursuant to Section 5(a), 15 U.S.C. 717d(a), of the Natural Gas Act, the Commission is required to conduct a hearing to establish "just and reasonable" rates for the transportation or sale of natural gas subject to its jurisdiction. The Commission, however, is not required to hold an adjudicatory hearing under the formal procedures set forth in Sections 556 and 557 of the Administrative Procedure Act, 5 U.S.C. 556 and 557, before establishing generally applicable producer rates. Since 1970 [1] the Commission has used the rule making procedure to fulfill its producer ratemaking responsibilities under the Natural Gas Act, and this methodology has been judicially sustained.[2]

Experience gained in these proceedings has demonstrated that the rule making procedure is not only workable but essential to viable producer rate regulation. As reflected in the Commission's early natural gas area rate opinions,[3] area ratemaking through adjudicatory proceedings, including cross-examination, rebuttal, surrebuttal and attendant opportunity for cross-examination of each, causes years of delay in rate adjustments made necessary and desirable by changed circumstances. In contrast, the Commission was able to prescribe a single uniform national rate by rule making within slightly over one year from the commencement of the proceedings.[4]

It is essential that the Commission retain this more efficient and expeditious method of producer regulation. The proposed deletion of ratemaking from the definition of "rule" would result in the Commission's inability to prescribe future producer rates in rule making procedures.

2. New Section 553(b)(2)(E) would require that the notice of rule making published in the *Federal Register* include "a list of the technical, theoretical, and empirical studies, if any, on which the agency intends to rely in the rule making proceeding and a statement of where this material may be inspected or copies thereof may be obtained." This requirement would preclude an agency from considering studies which may be conducted after notice of the rule making is given or which may be submitted to the agency by interested persons after the notice appeared in the *Federal Register*.

3. Section 4 of H.R. 12048 would establish Congressional review of rules adopted by agencies. Except for the categories set out in proposed Section 553(e), rules would only become effective after 60 calendar days of continuous session of Congress after the date of promulgation of a rule, if no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the rule, and neither House has adopted such a resolution, and not for 90 calendar days of continuous session of a committee has reported or either House has adopted such a resolution.

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[1] *Area Rates for the Appalachian and Illinois Basin Area, et al.,* Docket No. R-371, *et al.*, Order No. 411, 44 FPC 1112 (1970).

[2] *Phillips Petroleum Co.* v. *F.P.C.*, 475 F. 2d 842, 848-52 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). *Shell Oil Co.* v. *F.P.C.*, No. 74-3330 *et al.* (5th Cir. October 14, 1975).

[3] *The first area rate proceeding was Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). The order initiating the proceeding was issued December 23, 1960 (24 FPC 1121) and the Commission decision was not issued until 1965 (34 FPC 159). In the second such proceeding, *Austral Oil Co.* v. *F.P.C.*, (Southern Louisiana Area Rate Proceeding), 428 F.2d 407 (5th Cir. 1970), *cert. denied, Municipal Distributors Group* v. *F.P.C.*, 400 U.S. 950 (1970), the proceedings began in 1961 (25 FPC 942) but the Commission's decision was not issued until 1968 (40 FPC 530).

[4] *Opinion and Order Prescribing Uniform National Rate for Sales of Natural Gas Produced From Wells Commenced on or After January 1, 1973, and New Dedications of Natural Gas to Interstate Commerce on or After January 1, 1973*, Docket No. R-389-B, Opinion No. 699, issued June 21, 1974.

Under Section 309 of the Federal Power Act (16 U.S.C. 825h) and Section 16 of the Natural Gas Act (15 U.S.C. 717o) rules and regulations of the Federal Power Commission become effective thirty days after publication, unless a different date is specified. This complies with the present provisions of Section 553 of the Administrative Procedure Act. While a limited extension of the effective date of a new rule could be accomodated in many routine FPC matters, we are faced with an increasing number of situations, brought on by the national energy crisis, which requires a final determination within a short period. If H.R. 12048 were enacted, a rule subject to disapproval or reconsideration could not take effect for at least 60 calendar days and if the rule is adopted while Congress is not in session, i.e. a period of adjournment, effectiveness of the rule could be delayed indefinitely. In any case where a determination would be required within a shorter period, the Commission would have to promulgate "emergency rules," which would become effective immediately and stay in effect while the ordinary procedures for the adoption of a rule are followed. The Commission considers this an unnecessarily cumbersome procedure.

In the Natural Gas Act and the Federal Power Act Congress delegated to the Federal Power Commission broad authority to regulate in the public interest those aspects of the natural gas and electric utility industries beyond the reach of State regulatory control. Rules are promulgated pursuant to these enabling acts and the Administrative Procedure Act. If the Commission adopts rules which are contrary to law or which go beyond the mandate of the legislation which they are designed to implement, they are subject to judicial review. We recommend that review of agency rules remain with the courts. If Congress is concerned that agencies misinterpret congressional intent or exceed the intent of Congress in the manner in which such agencies are administering various laws, it seems the better course to hold oversight hearings, direct investigations by the General Accounting Office, or spell out congressional intent clearly through amendments of the enabling acts rather than to inject a dilatory procedure into the administrative process.

4. Section 5 would expand judicial review by providing that agency actions shall be set aside if "unwarranted by material in the rulemaking file." *In City of Chicago, Ill.* v. *FPC*, 458 F2d 731 (1971), the Court of Appeals for the District of Columbia Circuit upheld a rule of the FPC where the Court determined the following: "(1) that the factual predicate for the Commission's action could be a reasoned conclusion from the record as a whole, (2) that the factual predicate is one with which the Natural Gas Act permits the Commission to be concerned, and (3) that the Commission's action on the predicate is within its statutory authority." [5]

We believe these are satisfactory standards for judicial review of rulemaking proceedings and that the one set out in Section 5 of H.R. 12048, referred to above, is not as good because it is to vague and imprecise.

[5] The Court also stated that the "substantial evidence test," while appropriate to hearing-type proceedings, "would be of scant utility" in reviewing rulemaking proceedings.

The Office of Management and Budget advises that it has no objection to the submission of this report from the standpoint of the Administration's program.

RICHARD L. DUNHAM,
Chairman.

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., March 30, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to offer our views on H.R. 12048, a bill "Amending Title 5 of the United States Code to improve agency rulemaking by expanding the opportunities for public participation, by creating procedures for congressional review of agency rules, and by expanding judicial review, and for other purposes."

Subsections (b) through (e) of section 553 of the Administrative Procedure Act establish certain procedures to be followed by Federal agencies in rulemaking. These procedures include advance public notice of rulemaking, opportunity to submit views, and delayed effectiveness of rules. Subsection (a) of section 553 makes these procedures inapplicable "to the extent that there is involved a military or foreign affairs function of the United States." H.R. 12048 would amend subsection (a) and exempt instead "a matter pertaining to a military or foreign affairs function of the United States that is (A) specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and (B) is in fact properly classified pursuant to such Executive order."

The foreign intelligence responsibilities performed by the Central Intelligence Agency are fully excluded from the requirements of section 553 because they fall within the existing general exemption for military or foreign affairs functions. It is our position that foreign intelligence functions should continue to be generally excluded from public rulemaking procedures, and for this reason we are opposed to narrowing the existing exemption, as proposed in H.R. 12048.

The existing exemption fully protects sensitive intelligence matters from public disclosure and, therefore, achieves society's interest in preserving the necessary secrecy of certain foreign intelligence activities. This would not necessarily be accomplished under the exemption proposed in H.R. 12048 because the responsibilities of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure are an explicit statutory direction (50 U.S.C. 403) and are not based upon Executive order, as required in the bill. Therefore, by limiting the exemption to matters classified under Executive order, H.R. 12048 raises a potential conflict with the Director's statutory authorities. In addition, the "properly classified" standard proposed in H.R. 12048 could invite litigation in the coure of which sensitive information could be compromised.

There is an additional consideration which militates against removing the exemption from public rulemaking procedures for the foreign intelligence function. This involves striking a balance be-

tween the desirability of public participation in decisons whch directly affect the public and society's interest in conducting the Government's business efficiently and, in the foreign intelligence field, discreetly. Rules involving foreign intelligence functions have such a minimal public impact, if any, that, on balance, the public's interest would be best served by preserving the current exemption from the rulemaking procedures. The Central Intelligence Agency is not engaged in economic, social or other kinds of regulation which affect the public; nor is it a policy making agency in the field of foreign relations. The Agency was established under the National Security Act of 1947 to correlate and evaluate foreign intelligence and to perform other intelligence-related duties at the direction of the National Security Council.

One of the purposes of Executive Order 11905, issued by the President on February 19, 1976, is "to assure compliance with law in the management and direction of intelligence agencies and departments of the national government." We believe that this Executive order is responsive to the interests underlying the proposed change in the current exemption in section 553.

For the foregoing reasons, this Agency opposes favorable consideration of H.R. 12048 in its present form.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

GEORGE L. CARY,
Legislative Counsel.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., October 22, 1975.

Hon. PETER W. RODINO,
Chairman, Committee on the Judiciary, House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for our views on H.R. 3658 and H.R. 4629, bills which may be cited as the "Administrative Rulemaking Control Act." We are also providing herein views on H.R. 7689 and H.R. 9312, which are similar in purpose but considerably broader in scope.

H.R. 3658 and H.R. 4629, identical bills, provide that whenever an executive agency proposes either a new rule or modification to an existing rule, for which violation would be criminal, the proposal would be subject to review by Congress prior to becoming effective. If either House should pass a disapproving resolution, the proposal would not become effective. H.R. 7689 and H.R. 9312 could expand provision for prior congressional review to all proposed rules or regulations, without exception.

The objective of legislative delegation of authority to administrative agencies to make rules or to issue regulations is to relieve Congress of the difficult and time consuming burden of drafting highly detailed statutes which explicitly cover every conceivable problem or circumstance that might arise in the administration of those statutes. A requirement for prior congressional review of proposed rules or regula-

tions would substantially undermine and defeat the flexibility intended in vesting rulemaking authority in an administrative agency. In addition, the Administrative Procedure Act, as amended, (5 U.S.C. 551 *et seq.*) provides extensive and stringent procedural safeguards to ensure both the integrity and the equity of rules and regulations proposed by executive agencies in the performance of their legislatively mandated functions and responsibilities. The subject bills would add an additional, prior review of proposed rules or regulations which would delay, add uncertainty and confusion to, and impede effective and expeditious administration of law.

Interposing prior congressional review into administrative rulemaking would both undermine and conflict with the doctrine of separation of powers, wherein such rules are an executive function. The Department of Justice has consistently stated that provisions for one-house-veto of executive actions are not in conformity with the procedures for the enactment of legislation contemplated by Article I, Section 7 of the Constitution, which clearly indicates that the veto power of the President is intended to apply to all actions of Congress which have the force of law.

Whenever Congress believes that an agency has exceeded its statutory authority or has acted in a manner inconsistent with that authority, it may enact corrective legislation. In addition, agency rules which are in conflict with the general mandate of an agency's organic legislation or of questionable legality are subject to judicial review to determine whether or not the regulation or rule itself goes beyond the agency's delegated authority or is otherwise contrary to law.

For these reasons, we strongly oppose H.R. 3658, 4629, 7689 and 9312, enactment of which would not be in accord with the program of the President.

Sincerely,

JAMES M. FREY,
Assistant Director for Legislative Reference.

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., October 20, 1975.

Hon. PETER W. RODINO,
Chairman, Committee on the Judiciary, House of Representatives, Longworth Office Building, Washington, D.C.

DEAR MR. RODINO: Enclosed please find a corrected copy of my letter setting forth the Commission's views on H.R. 3658 and H.R. 4629.

Sincerely,

HARVEY L. PITT,
General Counsel.

Enclosure.

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., October 20, 1975.

Hon. JAMES M. FREY,
Assistant Director for Legislative Reference, Office of Management and Budget, Executive Office of the President, Washington, D.C.

DEAR MR. FREY: In response to your request of October 6, 1975, the Commission has considered H.R. 3658 and H.R. 4629 and has the following views.

The bills, which are identical in text, are designed to impose Congressional oversight in all instances where an "executive agency" promulgates any rule, "the violation of which subjects the person in violation to a criminal penalty." To that end, the bills would require that, before a proposed rule which may be the basis for the imposition of criminal sanctions can become effective, it must survive a period of time in the Congress without either House adopting a resolution of disapproval of the rule. If no resolution is proposed, the rule would become effective at the expiration of thirty legislative days from the date of publication of the rule in the *Federal Register*.[1] Where a resolution of disapproval is referred to a Committee for consideration, the rule can become effective only at the end of a period of sixty legislative days after publication of the rule, or at such earlier time as the Committee votes to discharge the resolution of disapproval.

We assume that the bills contemplate rules subjecting persons to criminal sanctions that can be imposed only by a court of law after trial.[2] In that case, they are somewhat narrower than a bill that previously was the subject of this Commission's comments last month—H.R. 7689.[3] That bill would require Congressional review of every rule or regulation promulgated by any administrative agency. The present bills are narrower, by virtue of the limitations in each to rules subjecting persons to criminal enforcement; nevertheless, even under H.R. 3658 and H.R. 4629, nearly every rule or regulation that this Commission will promulgate in the future would be subject to the proposed Congressional review process, since the vast majority could serve as the basis for criminal penalty. The statutes that this agency administers each provide for criminal sanction upon conviction for a "willful" violation of any statutory provision "or any rule, regulation, or order." [4] Provisions of this kind are recognized as necessary components of an administrative agency's ability to fulfill its Congressional mandate.[5]

The Commission is opposed to both H.R. 3658 and H.R. 4629. The bills proceed on assumptions which are questionable, would not, in any event, effectuate their intended purposes, are likely to delay and impede the effective administration of the federal securities laws, and may cause undue confusion and disruption among those persons and entities subject to Commission regulation.

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[1] The thirty-day period is to be broken only by an adjournment of Congress *sine die* or any adjournment of more than three days.

[2] In addition to general provisions of the federal securities laws making a violation of those acts or rules and regulations thereunder a criminal act, this Commission is also given the power to impose administrative, remedial sanctions, such as the suspension or revocation of a broker-dealer's registration, if it finds that the broker-dealer has violated a rule or regulation promulgated under any of the statutes the Commission administers. See Section 15(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. 78*o*(b)(4). However, it has consistently been held that such sanctions are not "a means of punishment of an offender," but are remedial in nature. See, *Beck* v. *Securities and Exchange Commission*, 430 F.2d 673, 674 (C.A. 6, 1970); *Berko* v. *Securities and Exchange Commission*, 316 F.2d 137 (C.A. 9, 1956); *Wright* v. *Securities and Exchange Commission*, 112 kF. 2d 89 (C.A. 2, 1940). *See also, C. P. Steuart & Bros.* v. *Bowles*, 322 U.S. 398 (1944).

[3] *See* letter from Ray Garrett, Jr., Chairman of this Commission, to James M. Frey, commenting on H.R. 7689, dated September 4, 1975.

[4] *See* Section 24 of the Securities Act of 1933, 15 U.S.C. 77x; Section 32 of the Securities Exchange Act of 1934, 15 U.S.C. 78ff; Section 29 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79z–3, Section 325 of the Trust Indenture Act of 1939, 15 U.S.C. 77yyy; Section 49 of the Investment Company Act of 1940; 15 U.S.C. 80a–48; Section 217 of the Investment Advisers Act, 15 U.S.C. 80b–17.

[5] *See McKinley* v. *United States*, 249 U.S. 397 (1919); *United States* v. *Grimaud*, 220 U.S. 504 (1911). *See also*, Davis, *Administrative Law* Section 2.13 (1965).

In introducing both H.R. 3658 and H.R. 4629, Congressman Levitas indicated that the primary purpose for these bills was to correct the abuses of unelected civil servants who, each year, "pass thousands upon thousands of far-reaching laws that can put citizens in jeopardy of liberty or property without having anyone elected by the people or answerable to them involved in the process," [6] and that the judiciary had adopted "lax" standards for review of administrative rules.[7]

The Commission believes that these are questionable premises at best. The Commission's rulemaking does not take place in a vacuum, but rather is subject to stringent requirements of the Administrative Procedure Act 5, U.S.C. 551, *et seq.*, as well as the requirements of the Securities Exchange Act of 1934 and the other organic statutes administered by the Commission. Thus, the Commission is required, prior to the promulgation of any rule, to publish notice thereof in the *Federal Register*, explain the bases and statutory authority for its proposal and give interested persons an opportunity to submit views, data and arguments concerning the Commission's proposal. In adopting regulations, the Commission must have a concise statement of the bases and purpose, as well as the authority, for its rule proposal, and must also treat the arguments raised by the various persons commenting on its proposals. While not specifically required in every instance, the Commission very often affords interested persons an opportunity to present oral views on its rule proposals as well.

After the adoption of a rule, the Commission's rulemaking may be challenged in a court and, contrary to the assumption implicit in the remarks of Congressman Levitas, such review may occasionally be had, in appropriate instances, prior to the implementation or effectiveness of the Commission's rules. *See, e.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). In any event, whether a Commission rule is challengeable prior to its effectiveness or in a Commission enforcement action seeking compliance by an affected person or entity, the standards of judicial review imposed by the courts are often far-reaching. While the courts cannot substitute their judgment for that of the Commission as to policy matters, they are required to, and they certainly do, insure that any factual predicates asserted as the bases for a Commission rule are substantiated, and that the Commission's action is not arbitrary, capricious or an abuse of discretion or, we would assume most important for Mr. Levitas's concern, not in excess of stautory authority. *See, e.g.*, 5 U.S.C. 706, establishing the general parameters of judicial review of final administrative agency action.

In any event, the proposed bills would not effectively resolve Congressman Levitas's concerns. Particularly for an agency like this Commission, which is charged with the responsibility of developing appropriate rules on complex and technical matters, the Congress is ill-equipped, without hearing on its own, to perform the judicial review function the bills would transfer from the courts to the legislative bodies. Some Commission rules are the product of years of extensive hearings and consideration, and could not be intelligently considered in a summary review proceeding such as these bills contemplate, in 30- or 60-day period, without a duplication of the same

[6] 121 *Cong. Rec.* H. 1077 (Daily ed., February 25, 1975).
[7] *Ibid.*

efforts in which the Commission has engaged to produce its rulemaking product.[8]

While we do not disagree with the underlying philosophical concerns that gave rise to this legislation—that the Congress should be kept apprised whether the administrative agencies it has created are faithfully adhering to and implementing the laws adopted by the Congress—a far more appropriate approach, in our view, is that adopted by the committees that oversee this Commission's substantive operations.[9] Those committees periodically review the Commission's operations, and just within the last four months culminated a legislative effort substantially revising and reevaluating this Commission's mandate and the boundaries within which it may exercise its administrative and rulemaking discretion. Thus, although the Commission's authority was significantly broadened in a number of areas as a result of this legislation, the legislation adopted (P.L. 94–29) defines with more specificity the process the Commission is expected to implement and more clearly the manner in which the Commission is to do so.

In addition, the new amendments to the Commission's organic statutes prescribe with greater particularity the mode and standards of judicial review of Commission rulemaking, making clear that the Commission may not exceed its "statutory jurisdiction, authority, or limitation, or [act in a manner] short of statutory right, or without observance of procedure required by law." Section 25(b) of the Securities Exchange Act, as adopted in P.L. 94–29.

Moreover, several provisions of the new legislation assure continued oversight of this agency's operations by the appropriate substantive Congressional oversight committee. Thus, for example, the Commission, which already is required to report annually to the Congress on its operations, has been furnished with a specific list of additional matters as to which details must be furnished to the Congress. *See, e.g.*, Sections 11A(c)(4), 11A(c), 12m and 23 of the Securities Exchange Act, as adopted by P.L. 94–29. In addition, in order to assure an annual review by the Commission's substantive Congressional oversight committees of the Commission's operations for the preceding year, new Section 35 of the Act requires that, in addition to review by relevant appropriations committees, the Commission must first transmit its operating budget and justification to its oversight committees. In our view, to the extent greater Congressional supervision of agency actions is desirable, these approaches are vastly superior to the troublesome provisions contained in the subject legislation.

Indeed, we believe that the bills run counter to the reasons for the establishment of administrative agencies. The objective of Congres-

[8] *See, e.g.*, Securities Exchange Act Rule 19b–3, 17 CFR 240. 19b–3, mandating the abolition of the rules of national securities exchanges requiring member firms to charge fixed commission rates on securities transactions to members of the investing public, adopted by the Commission after seven years of hearings by the Commission. When the Congress decided to implement the Commission's rulemaking conclusions in that regard in specific legislation, the substantive oversight committees of both Houses of Congress, engaged in four years of hearings in part on that subject prior to the formulation and adoption of appropriate legislation. See Section 6(e) of the Securities Exchange Act, as adopted by P.L. 94–29 (June 4, 1975).

[9] This Commission's operations are monitored by the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs and the Subcommittee on Consumer Protection and Finance of the House of Representatives Committee on Interstate and Foreign Commerce.

sional delegation of rulemaking authority to administrative agencies is to relieve Congress of the impossible burden of drafting statutes which explicitly cover every conceivable future problem. *See, e.g.*, *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973). The flexibility of the administrative process and the particular expertise of administrative agencies have enabled agencies like the Commission to act promptly where the exigencies of a particular situation warranted such action. The imposition of direct Congressional review of rule proposals would substantially undermine and, perhaps, in large measure defeat "the flexibility sought in vesting broad rulemaking authority in an administrative agency." *Mourning* v. *Family Publications Service, Inc., supra* at 372.

This is especially true in the case of this Commission and the specialized industry it regulates. The need for flexibility and expertise was recognized by Congress when it enacted the Securities Exchange Act of 1934. As the House Report noted:

"* * * Representatives of the stock exchanges constantly urged a greater degree of flexibility in the statute and insisted that the complicated nature of the problems justified leaving much greater latitude of discretion with the administrative agencies than would otherwise be the case. It is for that reason that the bill in dealing with a number of difficult problems singles out these problems as matters appropriate to be subject to restrictive rules and regulations, but leaves to the administrative agencies the determination of the most appropriate form of rule or regulation to be enforced. In a field where practices constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers in the administrative agency have been found practically essential, despite the desire of the Committee to limit the discretion of the administrative agencies so far as compatible with workable legislation.[10]

Moreover, the bills do not provide for any standards to govern the disapproval decision. Without such standards it is difficult both for the Congress to make an informed decision and for the agencies to draft their proposals so as to receive Congressional approval. Also, there is no provision for a record to be transmitted along with the rule, which would increase the chances that one Congressman could decide to introduce a resolution of disapproval simply to delay the process until he could get more information. Finally, the bill is silent as to what would happen if the Congress should adopt a resolution of disapproval. If this disapproval is for minor, non-substantive reasons, the Commission might be able to make the appropriate corrections, republish the proposed rule for final comment in accordance with the requirements of the Administrative Procedure Act, and then resubmit the rule to the Congress. In those cases where the Congress has requested changes be made, it is conceivable that the rulemaking process might have to begin anew. The end result would conceivably be undue hardship for those affected by the rules, the people whom the bill is intended to protect, because of the uncertainty surrounding the promulgation of the rule.

[10] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6-7 (1934).

While we would argue that no further oversight of this agency is necessary, we realize that some Congressmen may feel differently. However, any increase in Congressional control should not involve the costly and time-consuming features of these bills. In its report to the Attorney General in 1941, the Committee on Administrative Procedure noted that "[e]xperience, both in England and in this country, indicates that lack of desire, rather than lack of opportunity, has accounted for the absence of legislative interference with administrative regulations." The Committee noted further that "[l]egislative review of administrative regulations . . . has not been effective where tried." Administrative Procedure In Government Agencies, 77th Cong., 1st Sess., p. 120 (1941). The Commission welcomes Congressional comment regarding proposed Commission rules. We have often found such comments to be particularly helpful when they are submitted by the legislator or congressional committee that was instrumental in the drafting of the legislation to which the Commission's proposed rule relates. We believe, however, that the procedures established by the bill are unnecessary and would encumber unduly the Commission's rulemaking functions.

We understand that the House Committee on the Judiciary intends to consider these bills on October 21, 1975. Accordingly, we are forwarding a copy of this letter to Chairman Rodino, and advising him that this letter represents the separate views of the Securities and Exchange Commission and does not necessarily reflect the views of the Administration.

Sincerely,

HARVEY L. PITT,
General Counsel.

DEPARTMENTAL REPORTS

Departmental reports on the bill H.R. 10194 containing parallel provisions to those contained in H.R. 12048 concerning the definition of "Rule" and amending the provisions of subsection (a) of section 553 of title 5 providing exceptions to notice and comment rulemaking as provided for in that section:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
OFFICE OF THE SECRETARY,
Washington, D.C., March 26, 1976.

Hon. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request of November 7, 1975, for the Department's views with regard to the proposals (such as that set forth in section 2 of H.R. 10194) that the rulemaking requirements in the Administrative Procedure Act, 5 U.S.C. 553, be amended to delete the exceptions for rules that deal with public property, loans, grants, benefits, or contracts.

As I pointed out in my earlier interim response to your letter, this Department since 1970 has followed the policy of not taking advantage of the exceptions to rulemaking requirements in matters affecting those five categories. We have adopted this course of action because

we believe the benefit from full public participation in our rulemaking greatly outweighs the administrative inconvenience and delay which may result from use of the APA procedures. We intend to continue that policy in the future.

When the Administrative Procedure Act was originally enacted in 1946, the great expansion in the number of Federal financial assistance programs that we have seen over the last decade had not begun. It was undoubtedly not foreseen at that time how great a role those programs would come to play in the lives of all Americans. With that expansion it seems clear that there is a concomitant obligation to include the public in the process of developing the rules that will determine how those programs are implemented.

The extensive degree to which Federal agencies administering grant programs have been provided with rulemaking authority over those programs would also seem to suggest the need for the broadest possible participation by the public in that process. Only through that means can we be confident that programs designed to provide assistance to specific groups of people are being responsive to their actual needs.

Although a repeal of these exemptions will not impact on the procedures of this Department, we recognize that other departments and agencies will be offering different perspectives on the impact of such a change in the APA. For example, we note with respect to the "public contracts" rulemaking exemption that the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget is charged with providing "overall direction of procurement policy" and is directed to establish a system of uniform procurement regulations for the executive agencies. OFPP is likewise directed to include in its regular reports to the Congress "appropriate legislative recommendations." Notwithstanding this Department's experience, we must, therefore, respectfully defer to the recommendations of the Office of Management and Budget on the desirability of repealing the APA's exemption of public contracts. Likewise, we similarly defer to the views of the General Services Administration regarding the desirability of removing the exemption for "public property".

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

STEPHEN KURZMAN,
Assistant Secretary for Legislation.

DEPARTMENT OF STATE,
Washington, D.C., March 2, 1976.

HON. PETER RODINO,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of January 22, 1976, requesting a report on H.R. 10194, a bill "To amend chapter 5, subchapter II, of title 5, United States Code, to provide for improved administrative procedures." The Department has a special interest in section 2 of the

bill which would amend section 553 of title 5, United States Code, which relates to rulemaking. H.R. 10194 would delete the present complete exemption from the public notice and comment requirements of this section for foreign affairs functions of the United States and substitute an exemption for only those foreign affairs functions which are required under Executive order criteria to be kept secret.

In our view, section 553 procedures are applicable to rules which are themselves to be published in the *Federal Register*. That is, if an agency statement "of general or particular applicability and future effect designed to implement . . . policy" is not itself required to be published in the *Federal Register* under 5 U.S.C. 552(a)(1) or other law, and is not so published, we believe the agency is not obliged to follow section 553 procedures before adopting that statement. Quite apart from the foreign affairs function exemption, we do not believe the Administrative Procedure Act contemplated, for example, that the Acting Legal Adviser's letter of May 19, 1952 to the Acting Attorney General, the so-called "Tate Letter" (XXVI *Bulletin*, Department of State, p. 948, June 23, 1952), should have been published in the *Federal Register* in draft for public comment before being dispatched to its addressee. That letter states in pertinent part "(I)t will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."

We believe the foregoing interpretation of the scope of section 553 is borne out by consistent agency practice. We are unaware of any instance in which an agency has published as a proposed rule under section 553 a statement of policy that was not intended, as finally adopted, to be a public rule of the agency. In this context the national defense and foreign policy exception in H.R. 10194 would have practical significance in only a very narrow range of circumstances. It would have application only where an executive order precluded advance public notice of a rule which itself would be made public.

Accordingly, paragraph (1) of section 2 of H.R. 10194 really amounts to a repeal of the foreign affairs exemption. Rulemaking involving foreign affairs functions might in some instances be so permeated with foreign policy considerations that public participation would not be in the public interest. During consideration of this question by the Administrative Conference it was suggested that in such cases the Department could publish regulations in the *Federal Register* without prior public notice by relying upon the existing exemptions contained in 5 U.S.C. 553 (b)(B) and (d)(3). In our view, an expanded use of these exemptions would introduce an undesirable subjective element into decisions as to whether or not proposed rulemaking procedures should be utilized. Agency reliance upon such subjective standards as "impracticable, unnecessary, or contrary to the public interest" would seem less conducive to increased public participation in rulemaking relating to foreign affairs functions. A more detailed statement of the reason for finding that public participation would be contrary to the public interest might itself have to be kept secret in the interest of national defense or foreign policy.

Heretofore, it has not been necessary to consider whether the general language of section 553 (b)(B) and (d)(3) covered foreign affairs functions. Rulemaking relating to such functions is separately and

explicitly exempted from the application of section 553. Unless a clear and unambiguous legislative history indicated otherwise, however, an inference might be drawn from the repeal of the present foreign affairs exemption that the remaining general exemptions could not be construed to embrace a specific ground for noncompliance with section 553 procedures which the Congress had eliminated from the statute. Whatever the legislative history, such an argument would almost surely be made by some litigant.

Paragraph (3) of section 2 of H.R. 10194 amends clause (B) of the third sentence of 5 U.S.C. 553(b) of state that "contrary to the public interest" includes "the interest of national defense or foreign policy in a matter pertaining to a military or foreign affairs function." This change appears to be intended to overcome the concerns we have raised in the foregoing discussion.

In 1973, the Department voluntarily undertook to invite public participation in rulemaking, and since then there have been no occasions when the foreign affairs exemption has been invoked by this Department. We do not wish to speak for other agencies on the foreign affairs exemption; nor do we believe a sufficient basis has been established for a public interest in statutorily repealing or modifying the military exemption.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely,

ROBERT J. MCCLOSKEY,
Assistant Secretary for Congressional Relations.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., February 17, 1976.

Hon. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Defense on H.R. 10194, 94th Congress. This bill contains several proposals to amend the Administrative Procedure Act. Those parts of the bill dealing with the definition of "rule" and the definition of "ratemaking and cognate proceedings," as well as accommodating modifications of 5 U.S.C. 556(d) and 5 U.S.C. 557(b), do not affect the day to day operation of this department. We, therefore, defer to the views of the Department of Justice on those aspects of the bill.

In our view the revision of section 553 of title 5, as set forth in section 2 of the the bill, is premature insofar as it repeals the "military or foreign affairs" rulemaking exemption. Following many years of practice under that exemption, this department recently adopted procedures for public participation in rulemaking having direct and substantial public impact. 32 CFR Part 296; 40 F.R. 4911 (February 3, 1975). Because the regulations are only a few months old, we believe it desirable to gain the benefit of some practice under these new procedures. Their impact can then be realistically assessed

in the light of actual experience. Accordingly, we submit that legislative changes in this area should await a period of experimentation under 32 CFR Part 296 so as to determine what, if any, practical problems would be posed for this department by repeal of the exemption.

H.R. 10194 would replace the "military or foreign affairs" rule-making exemption, with an exemption for matters which are "in fact properly classified" in the interest of national defense or foreign policy. This language, apparently drawn from the 1974 Amendments to the Freedom of Information Act, poses obvious problems. It is one thing to employ that standard in the context of a request for pre-existing documents; it is quite another matter to introduce that concept into ongoing policy-making. Moreover, the bill fails to explain who determines what "matter" is or is not "properly classified." Nor does the bill explain whether this issue is to be decided on review or de novo. In any event, we believe that a collateral dispute over the propriety of a classification could well delay the promulgation or effectiveness of important rules—with concomitant prejudice to the public interest.

The Commission on Government Procurement (created by Public Law 91–129) in an exhaustive 2½ year study of the entire Federal procurement process found that the varied practices among agencies in soliciting comments on proposed procurement regulations do not meet minimum standards for promoting fair dealing and equitable relationships among the parties in Government contracting. The Commission also found, however, that making procurement regulations subject to APA provisions, together with interpretative problems of applying APA definitions or terms such as "impracticable, unnecessary, or contrary to the public interest," among others, would significantly burden the procurement process. The Commission concluded that the formal requirements of APA will not significantly benefit the Government, the contractors, or other interested parties. In lieu of inflicting the uncertainties of the APA on the procurement process and the agencies, the Commission favored a requirement that an Office of Federal Procurement Policy establish criteria for participation in the development of procurement regulations.

This recommendation of the Commission on Government Procurement was incorporated into the statute (P.L. 93–400) which was enacted only last year and which set up the Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB). The OFPP only became fully staffed and operational within the past few months, and, we understand, has recently published in the *Federal Register* a draft regulation which will be the initial implementation of this statutory requirement.

In view of the responsibility and authority that has been placed in the OFPP on this matter of public participation in the procurement regulatory process, it is premature at best to suggest eliminating the exemptions currently contained in the Administrative Procedue Act. Therefore, the Department of Defense opposes this change.

Because the exact scope of the bill and its application are unclear, any estimate of the cost which its enactment would require would be purely speculative. However, there would undoubtedly be some additional costs.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

RICHARD A. WILEY.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., March 8, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Office of Management and Budget on H.R. 10194, 94th Congress, which proposes to amend certain administrative procedure provisions of Title 5, United States Code. These comments are addressed only to those proposals of the bill which would affect Federal procurement policy.

The Office of Federal Procurement Policy opposes H.R. 10194 to the extent that paragraph (2) of Section 2 thereof would delete the present rulemaking exemptions for matters relating to public property, grants, and contracts, for the reasons which follow.

The Commission on Government Procurement, as part of its lengthy study of the entire Federal procurement process, found that:

> "* * * giving contractors and other interested parties an opportunity to comment on proposed procurement regulations during their development is essential to ensure consideration of all available alternatives and information, promote better understanding and relationships, and enhance the acceptability of regulations when adopted."

At the same time, the Commission recognized that Administrative Procedure Act rulemaking procedures would be unduly burdensome to the procurement process. Among other problems, the Commission pointed out that:

> "Procurement regulations * * * are issued by a number of offices, both headquarters and subordinate. Agency procurement directives also extend to technical and business decisions that are made at all levels in a procuring agency. Subjecting activity of this type to APA rulemaking could only create an administrative morass."

The Commission concluded:

> "There is a need to establish criteria and procedures within the executive branch to give contractors and other interested parties an opportunity to comment on proposed procurement regulations during their development. Adoption of APA rulemaking as a means of achieving such outside participation is fraught with many administrative difficulties and possibilities of delaying litigation which offset the minimal benefits attained by APA's requirements of notice and opportunity to comment. The benefits of meaningful outside participation during the development of procurement regulations can be attained much more easily through executive branch action.

* * * * * * *

"Finally, placing the authority in the Office of Federal Procurement Policy would allow the flexibility needed to adapt and refine procurement rulemaking procedures in the light of experience and future developments."

Under Public Law 93-400, the Administrator for Federal Procurement Policy is charged with "establishing criteria and procedures for an effective and timely method of soliciting the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms." The Administrator's authority and responsibilities in this area are quite broad, and the legislative history appears clear that he is meant to have greater flexibility and discretion than if the exemption in question were deleted. The underlying Senate Report (Government Operations Committee) No. 93-692, February 26, 1974, stated with regard to this provision:

"Under this subsection, the Administrator is to establish procedures for public participation in procurement rule-making. These would apply to any policy or regulation issued by the Office, the Federal Procurement Regulations (FPR), Armed Services Procurement Regulation (ASPR), the primary regulations of other agenices, and lower level regulations as determined by the Administrator. Existing agency practices range from ad hoc solicitations of public comment to these approaching the fairly well-developed procedures of the Department of Defense. To provide greater flexibility and accommodate the special needs of parties with an interest in procurement, the responsibility for developing rule-making procedures is assigned to the Administrator, in lieu of simply removing the present exemption of contracts from the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. 553(a)(2). The emphasis here is on the timely and effective solicitation of the viewpoints of all interested parties on policies and regulations of general application."

The Office of Federal Procurement Policy did not become operational until January 1, 1975, and staffing was not completed until September 1975. Therefore, notwithstanding the high priority I have placed on this matter, final procedures have not yet been estabilshed for public participation in procurement rulemaking. However, the Office of Federal Procurement Policy has issued, in December 1975, a draft regulation implementing this statutory requirement, as well as another requirement of the same statute, that we establish "a system of coordinated, and to the extent feasible, uniform procurement regulation for the executive agencies." This regulation will itself be subject to the rulemaking procedures it establishes. Accordingly, the public at large, as well as industry and professional associations and Government agencies, will be afforded ample opportunity to submit for consideration their comments on the proposed procedures, and to be heard at a formal open meeting of the Office of Federal Procurement Policy.

At least thirty days prior to effectuating the procedures eventually estabilshed, a detailed report on the proposed regulation, as required by Public Law 93-400, will be forwarded to the House and Senate Committees on Government Operations. The same report will also be forwarded to you in view of your express interest in this matter, and to the Senate Committee on the Judiciary, for the same reason.

Paragraph (3) of Section 2 of H.R. 10194 would provide a means for agencies to exempt themselves from rulemaking requirements, when such requirements are found to be impracticable, unnecessary, or contrary to the public interest, but would also impose notice and publication requirements concerning exemptions which, because of the many administrative levels issuing procurement regulations, would be extremely burdensome in practice. The position of the Office of Federal Procurement Policy is that subjecting procurement regulations to the procedural rulemaking requirements of 5 U.S.C. 553 is itself impracticable and unnecessary, and that, therefore, any exemption from the rulemaking requirements for matters relating to contracts should be a statutory exemption, not an array of administrative exemptions which would eventually be so extensive as to require a catalogue.

The Office of Federal Procurement Policy attaches great importance to obtaining the viewpoints of all interested parties, inside and outside the Government, for consideration in the formulation of effective and workable procurement policies and procedures which, while protecting the Government's essential interests, recognize and accommodate the contractors' problems to the greatest extent practicable. The course proposed by the Office will achieve those objectives without imposing more burdensome procedures which will have no countervailing public benefit.

In addition to contracts, the bill would also apply to public property, loans, grants, and benefits, matters presently exempt from statutory rulemaking procedures. In the almost thirty years since enactment of the Administrative Procedure Act, matters relating to public property and grants have become closely interelated with the procurement process. For instance, the Commission on Government Procurement found much confusion between grant-type assistance matters and procurecent matters, grants and contracts being used interchangeably in some cases. One recommendation of the Commission, that contract and grant relationships be distinguished through legislation, is being studied by an interagency task group. Management of Government property has itself evolved into a very complex area of procurement expertise, particularly as regards issues of liability, risk of loss or damage, and insurance. Thus, as regards Federal procurement today, matters relating to public property, grants, and contracts are no longer discrete and distinguishable, and the statutory exemption should be retained for public property and grants, as well as for contracts.

We appreciate being given the opportunity to present our views.

Sincerely,

HUGH E. WITT,
Administrator for Federal Procurement Policy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * * * *

PART I—THE AGENCIES GENERALLY

* * * * * * *

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general [or particular] applicability [and future effect] designed to implement, interpret, or prescribe law or policy or [describing] *to describe* the organization, procedure, or practice requirements of an agency and includes [the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing] *any amendment, revision, or repeal of such a statement*;

(5) "emergency rule" means a rule which is temporarily effective without the expiration of the otherwise specified periods of

time for public notice and comment and which was duly promulgated by an agency pursuant to a finding that delay in the effective date would—

(A) seriously injure an important public interest,

(B) substantially frustrate legislative policies, or

(C) seriously damage a person or class of persons without serving any important public interest;

(6) "ratemaking and cognate proceedings" means agency process for the approval or prescription for the future of rates, wages, corporate or financial structure, or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor, or of valuations, costs, accounting, or practices bearing on any of the foregoing;

[5](*7*) "rule making" means agency process for formulating, amending, or repealing a rule;

[6](*8*) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

[7](*9*) "adjudication" means agency process for the formulation of an order;

[8](*10*) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

[9](*11*) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

[10](*12*) "sanction" includes the whole or a part of an agency—

(A) prohibition requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

[11](*13*) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

[12](*14*) "agency proceedings" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

[13](*15*) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

* * * * * * *

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

[(1) a military or foreign affairs function of the United States; or]

(1) a matter pertaining to a military or foreign affairs function of the United States that is (A) specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order; or

(2) a matter relating to agency management or personnel [or to public property, loans, grants, benefits, or contracts].

[(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

[(1) a statement of the time, place, and nature of public rule making proceedings;

[(2) reference to the legal authority under which the rule is proposed; and

[(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

[(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

[(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

[(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

[(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

[(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

[(2) interpretative rules and statements of policy; or

[(3) as otherwise provided by the agency for good cause found and published with the rule.

[(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.]

(b) (1) (A) Except as provided in subparagraph (B), general notice of proposed rule making shall be published in the Federal Register. In addition agencies shall make a reasonable attempt to inform those likely to be affected by the proposed rule making or, if the group

is large, representative members thereof of the pendency of the proceeding; and agencies shall send copies of the notice of proposed rule making to all persons requesting such notice.

(B) If all persons affected by the proposed rule making are named and either personally served or otherwise have actual notice thereof in accordance with law, published notice in the Federal Register may be omitted.

(2) The notice shall include—

(A) a statement of the time, place, and nature of public rule-making proceedings and the projected effective date of rules;

(B) a brief statement of the purpose of the proposed rule making, and a reference to the legal authority under which the rule will be proposed;

(C) a description of the subjects with which the rule making will deal and major issues it will raise;

(D) the text of a proposed rule, if available, except that the agency may omit the proposed text in its initial notice of rule making, if, prior to the adoption of a rule, the agency publishes and distributes (as provided in paragraph (1) of this subsection) the text of the proposed rule, a reference to the initial notice, and a statement of the time, place, and nature of the public proceedings for the consideration of the text of the proposed rule; and

(E) a list of the technical, theoretical and empirical studies, if any, on which the agency intends to rely in the rulemaking proceeding and a statement of where this material may be inspected or copies thereof may be obtained.

(3) Unless notice with opportunity for public comment are otherwise required by statute, this subsection and paragraphs (1), (2), and (3) of subsection (c) do not apply—

(A) to rules of agency organization, practice, or procedure; or

(B) when the agency finds that—

(i) public notice and comment are unnecessary due to the routine nature or the insignificant impact of the proposed rule, or

(ii) emergency rules should be promulgated.

An agency which finds that a rule is within an exception specified in subparagraph (A) or (B) of this paragraph shall publish in the document promulgating such rule that finding and a brief statement of reasons therefor.

(4) The requirements of this subsection shall not preclude an agency from—

(A) inviting persons representing different points of view to submit,

(B) creating an advisory committee to report, or

(C) using other such devices to obtain

suggestions regarding the content of proposed rules prior to notice of rule making.

(c)(1) The agency shall give interested persons not less than 45 days after the notice required by subsection (b) to participate in the rule making. The agency may extend this period of time if it appears that such period is too short to permit diligent, interested persons to prepare comments or if the agency determines that other circumstances justify an extension.

(2) The agency shall receive written statements on each proposed rule. The agency may hold hearings on a proposed rule to receive oral presentations. Any such hearing shall be conducted in such a manner, for such duration, and at such places and times as the agency shall direct. The head of the agency, one or more of the members of the body which comprises the agency, or one or more agency employees assigned the responsibility of recommending changes in the proposed rule shall preside at any such hearing.

(3) If the agency determines that there is a significant controversy over a factual issue the resolution of which will materially affect the substance of the rule, the agency shall utilize a procedure for resolution of that issue which will permit different points of view to be adequately presented, will provide for agency objectivity in such resolution, and will not unduly delay the rule making. Not later than the date on which the rule is promulgated, the agency shall state its resolution of the issue and the reasons therefor.

(4) The agency shall maintain a file of each rulemaking proceeding. The file shall include—

(A) the notice of proposed rule making required by subsection (b) and any supplemental notice;

(B) all relevant material and all material which the agency by law is required to retain on file in connection with the rule making;

(C) the rule and statements required of the agency in formulating the rule; and

(D) copies of petitions for exceptions to, amendments of, or repeal of a rule.

This file shall be available to the courts and the Congress in connection with review of the rule, and to the public as provided by law.

(d) (1) After consideration of all relevant material, the agency shall adopt such rule as it deems appropriate, incorporating therein a concise statement of (A) the purpose of the rule, (B) the legal authority for the rule, and (C) any other statements required by law. In addition, at the time a rule is adopted, the agency shall place in the rulemaking file a statement setting forth the primary considerations interposed by persons outside the agency in opposition to the rule as adopted, together with brief explanations of the reasons for rejecting those consideration.

(2) When rule making is required to be conducted in compliance with subsections (a) and (b), an agency may not adopt a rule substantially different from the proposed rule, unless (A) interested persons were apprised of such potential differences during the period for public participation and were afforded an opportunity to comment upon them, or (B) the agency gives notice as required by subsection (b) (2) (D) with respect to such revised rule and receives comments on such differences.

(e) Unless a longer period of time is required by law or provided in the rule—

(1) a rule may become effective immediately if it—

(A) grants or recognizes an exemption to or relieves a restriction from a rule, or

(B) is exempt from public notice and comment under subsection (b) (3) of this section; and

(2) a rule which is subject to disapproval or reconsideration pursuant to chapter 6 of this title shall not take effect except as provided in sections 602(a) and 603(b) of such chapter.

(f) At the time of promulgation of an emergency rule the agency shall commence rulemaking proceedings in accordance with the subsections (b), (c), and (d), except that the period for public comment shall be limited to 60 days unless the agency determines that an additional 30 days are necessary to enable diligent, interested persons to participate. Within 30 days after the close of the period for public comment, the agency shall issue a final rule to take effect as provided in subsection (e). Unless earlier withdrawn or set aside by court action, an emergency rule shall expire 210 days after its promulgation or upon the effective date of the final rule, whichever occurs first.

(g) When rules are required by statute to be made on the record after opportunity for agency hearing, sections 556 and 557 of this title apply to significant issues of fact in dispute instead of subsections (b), (c), and (d) of this section.

(h) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(i) Unless a rule is adopted in conformity with this section, or is within an exception to the provisions of this section, no person shall be required to resort to or be adversely affected by such a rule, nor may such a rule be admitted into evidence or considered in any agency proceeding, or any judicial review of such proceeding, except that this shall not prevent a person from interposing such a rule as a defense to an agency proceeding or to a criminal prosecution, or from seeking agency or judicial review of such rule.

* * * * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In [rule making or] *ratemaking and cognate proceedings, rule making, or* determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

* * * * * * *

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

* * * * * * *

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in [rule making or] *ratemaking and cognate proceedings, rule making, or* determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

Chapter 6—CONGRESSIONAL REVIEW OF AGENCY RULE MAKING

Sec.
601. Definitions.
602. Resolution of disapproval.
603. Resolution for reconsideration.
604. Effect on statutory time limits.
605. Computation of calendar days of continuous session of Congress.
606. Procedure for consideration of resolutions.
607. Effect on judicial review.
608. Administrative Conference study.

§ 601. Definitions

The definitions set forth in section 551 of this title shall apply to this chapter except that—

(1) those functions excluded from the definition of the term "agency" by paragraph (1)(H) of such section are included in such definition for purposes of this chapter;

(2) the terms "rule", and "emergency rule" shall not include—

(A) rules of agency organization, practice, and procedure,

(B) rules relating to agency management and personnel,

(C) rules granting or recognizing an exception or relieving a restriction, or

(D) rules adopted without public notice and comment pursuant to a valid agency finding that such notice and comment were unnecessary due to the routine nature or insignificant impact of the rule; and

(3) the term "promulgation" means filing with the Office of the Federal Register for publication.

§ 602. Resolution of disapproval

(a)(1) Simultaneously with promulgation or repromulgation of any rule, including an emergency rule, the agency shall transmit a copy thereof to the Secretary of the Senate and the Clerk of the House of Representatives. Except as provided in paragraph (2), rules other than emergency rules shall not become effective, if—

(A) within 90 calendar days of continuous session of Congress after the date of promulgation, both Houses of Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: "That Congress disapproves the rule promulgated by dealing with the matter of , which rule was transmitted to Congress on .", the first blank being filled with the name of the agency issuing the rule, the second blank being filled with the title of the rule and such further description as may be necessary to identify it, and the third being filled with the date of transmittal of the rule to Congress; or

(B) within 60 calendar days of continuous session of Congress after the date of promulgation, one House of Congress adopts such a concurrent resolution and transmits such resolution to the other House, and such resolution is not disapproved by such other House within 30 calendar days of continuous session of Congress after such transmittal.

(2) If at the end of 60 calendar days of continuous session of Congress after the date of promulgation of a rule, other than an emergency rule, no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the rule, and neither House has adopted such a resolution, the rule may go into effect immediately. If, within such 60 calendar days, such a committee has reported or been discharged from further consideration of such a resolution, or either House has adopted such a resolution, the rule may go into effect not sooner than 90 calendar days of continuous session of Congress after its promulgation unless disapproved as provided in paragraph (1).

(b)(1) An agency may not promulgate a new rule or an emergency rule identical to one disapproved pursuant to this section unless a statute is adopted affecting the agency's powers with respect to the subject matter of the rule.

(2) If an agency proposes a new rule dealing with the same subject matter as a disapproved rule, the agency shall comply with the procedures required for the issuance of a new rule, except that if less than 12 months have passed since the date of such disapproval, such procedures may be limited to changes in the rule.

§ 603. Resolution for reconsideration

(a) Either House of Congress may adopt a resolution directing agency reconsideration of a rule other than an emergency rule. The matter after the resolving clause of such a resolution shall be as follows: "That the directs to reconsider its rule dealing with the matter of which rule is found at ." (or if a new rule "was transmitted to Congress on ."), the first blank being filled with the House of Congress adopting the resolution, the second blank being filled with the name of the agency issuing the rule, the third blank being filled with the title of the rule and such further description as may be necessary to identify it, and the fourth blank being filled with the citation to the rule in the agency records or, if it is a new rule, the date on which it was transmitted to Congress.

(b)(1) If a resolution for reconsideration of a rule, other than an emergency rule, is adopted by either House within 90 calendar days of continuous session of Congress after the date the rule was promulgated, the rule shall not go into effect. The agency shall reconsider the rule and within 60 days either withdraw or repromulgate the rule with such changes and with such public participation as the agency determines appropriate. If the agency takes no action within 60 days such rules shall lapse. If promulgated, the rule shall be subject to congressional review and go into effect as provided in this chapter.

(2) If at the end of 60 calendar days of continuous session of Congress after the date of promulgation of a rule, other than an emergency rule, no committee of either House of Congress has reported or been discharged from further consideration of a resolution of reconsideration of a rule, the rule may go ito effect at the end of such period. If, within such 60 calendar days, such a committee has reported or been discharged from further consideration of such a resolution, the rule may go into effect not sooner than 90 calendar days of continuous session of Congress after its promulgation.

(c) One hundred eighty days after passage of a resolution for reconsideration with respect to a rule which has taken effect, the rule shall lapse unless repromulgated by the agency. Unless excepted by subsection 553(a) of this title, the agency shall, not less than 60 days prior to repromulgating such a rule, give notice of a proceeding to consider its repromulgation. The notice and proceeding shall comply with subsections (b) and (c) of section 553 of this title, except that the provisions of paragraph 553(b)(3) shall not be available to the agency and the agency shall hold a hearing for oral presentations. Rules repromulgated pursuant to this subsection within 180 days of the passage of the resolution for reconsideration shall take effect as provided in section 602(a); and during the period for congressional review provided in that section the reconsidered rule may remain in effect.

(d) A concurrent resolution of disapproval supersedes a resolution for reconsideration of the same rule or part thereof.

§ 604. Effect on statutory time limits

If a resolution of Congress disapproves or directs reconsideration of a rule which was being promulgated subject to a statutory time limit for rule making, the adoption of the resolution shall not relieve the agency of its responsibility for adopting a rule, but any statutory time limit shall apply to such renewed rule making only from the date on which the resolution was adopted.

§ 605. Computation of calendar days of continuous session of Congress

For the purposes of this chapter—

(1) continuity of session is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of calendar days of continuous session.

§ 606. Procedure for consideration of resolutions

(a) The provisions of this section are enacted by Congress—

(1) as an exercise of the rule making power of the Senate and the House of Representatives, respectively, and as such they are

deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by sections 602 and 603 of this title; and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b)(1) Resolution of disapproval and resolutions for reconsideration of a rule shall, upon introduction or receipt from the other House of Congress be immediately referred by the presiding officer of the Senate or of the House of Representatives to the standing committee having oversight and legislative responsibility with respect to the promulgating agency in accordance with the rules of the respective House; and such resolutions shall not be referred to any other committee.

(2) If a committee to which is referred a resolution which has not been adopted by the other House of Congress, does not report out such resolution—

(A) within 45 calendar days of continuous session of Congress after referral, in the case of a resolution to disapprove or to require reconsideration of a rule pursuant to section 602(a) or 603(b); or

(B) within 90 calendar days of continuous session of Congress after referral, in the case of a resolution to require reconsideration of a rule pursuant to section 603(c),

it shall be in order to move to discharge such committee from further consideration of such resolution.

(3) If a committee to which is referred a resolution which has been adopted by the other House of Congress does not report out such resolution within 15 calendar days of continuous session of Congress after referral, in the case of a resoltuion to disapprove a rule pursuant to section 602(a), it shall be in order to move to discharge such committee from further consideration of such resolution.

(4) Such motion to discharge must be supported by one-fifth of the Members of the House of Congress involved, and is highly privileged in the House and privileged in the Senate (except that it may not be made after the committee has reported a resolution of disapproval or for reconsideration with respect to the same rule); and debate thereon shall be limited to not more than 1 hour, the time to be divided in the House equally between those favoring and those opposing the motion to discharge and to be divided in the Senate equally between, and controlled by, the majority leader and the minority leader or their designees. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(c)(1) Except as provided in paragraphs (2) and (3) of this subsection, consideration of a resolution of disapproval or for reconsideration shall be in accord with the rules of the Senate and of the House of Representatives, respectively.

(2) When a committee has reported or has been discharged from further consideration of a resolution with respect to a rule, it shall be in order at any time thereafter (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not

debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) Debate on the resolution shall be limited to not more than two hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to or motion to recommit, the resolution is not in order and it is not in order to move to reconsider the vote by which the resolution is agreed or disagreed to.

§ 607. Effect on judicial review

Congressional inaction on or rejection of a resolution of disapproval or of a resolution for reconsideration shall not be deemed an expression of approval of such rule.

§ 608. Administrative Conference study

The Administrative Conference of the United States shall undertake a study of congressional review of agency rules under sections 601 to 606 and its effect on agency rule making and report its findings to Congress on or before July 1, 1982. The sum of $200,000 is authorized to be appropriated for such study.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections *553(c) (3) or* 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; **[**or**]**

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court**[.]***; or*

(G) unwarranted by material in the rulemaking file when and to the extent an agency rule is not covered by clause (E) hereof, and a rulemaking file is required by section 553 (c) (4) of this title or similar provision of law.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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DISSENTING VIEWS OF HON. JOHN F. SEIBERLING

H.R. 12048's provisions concerning Congressional "review" of administrative rulemaking are unwise and will be counter-productive. Rather than enhancing the public accountability of Federal departments and agencies, the bill will be more likely to reduce public accountability.

Congress and individual Congressmen already have ample opportunity to participate in the rulemaking process. Any Congressman, for instance, can submit written or oral comments to the appropriate department or agency as it considers and finalizes the rules. Any Congressman can introduce legislation to nullify or modify any rule or regulation he considers bad. Committees can conduct oversight hearings. Congress can use the authorization and appropriation processes to persuade the particular department or agency of the unsoundness of its rules and regulations. And, of course, Congress can repeal or amend statutes authorizing a particular department or agency to promulgate rules and regulations. In short, if Members of Congress dislike particular regulations proposed by particular agencies, they already have methods of venting their individual and collective displeasure.

The provisions of H.R. 12048, however, would give extraordinary power to Committee Chairmen, power that could too easily be abused. H.R. 12048 would make it politic for an agency to submit proposed regulations to the Chairman of the appropriate legislative Committee in advance of their formal public promulgation. Such a pre-promulgation review would be necessary for an agency to avoid the possibility of the Chairman's calling up a proposed regulation for floor consideration if it turned out that the Chairman did not like the way the agency wrote the regulations. H.R. 12048 would, thus, enable and perhaps encourage Committee Chairmen and key Committee Members to intimidate or otherwise interfere with the operations of Executive departments and agencies. The possibilities of abuses are far too great in comparison with the limited and uncertain improvement in agency responsiveness to the public and sensitivity to the intent of the laws administered by the agency.

If this bill is enacted into law, Congress is going to have to spend an inordinate amount of time just reviewing regulations, especially in light of the bill's provision enabling 20% of either body (87 Members of the House or 20 Members of the Senate) to require a floor vote. The majority report indicates that the Director of the Federal Register reported that between January 1 and September 30, 1975, there were 10,245 proposed rules. This bill could end up forcing several hundred floor votes every year, even if only 5% of the proposed regulations were opposed by 20% of the Members. Our time can in most cases be better spent in other endeavors.

In addition, we would have to hire hundreds of additional Committee staff employees simply to review the regulations and prepare

memoranda for the benefit of the Members. Again, the expense will far outweigh any probable benefits.

There may be certain areas in which Congress particularly needs such a review procedure. The Federal Elections Commission appears to be such an area. But we should not establish the procedure across-the-board.

H.R. 12048 will undoubtedly encourage vast amounts of special interest lobbying directed towards every Congressman. It will invite wholesale politicization of Federal departments and agencies through Congressional pressures.

The way to improve agency responsibility is through more diligent use of the powers of Congressional oversight—not by giving Executive agencies a choice between politicization and paralysis.

JOHN F. SEIBERLING.

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